Supreme Court, U.S.
FILED

01 324 AUG 23 2001

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No. _____

In The Supreme Court Of The United States

REGINALD A. WILKINSON, et al.,
Petitioners,

v.

HBRANDON LEE FLAGNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

Under *Turner v. Safley*, 482 U.S. 78, 89 (1987), "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

Does *Turner* require courts to conduct a personally-tailored review for each inmate who challenges such a regulation, forcing the government to show on a case-by-case basis why that particular inmate must obey the regulation, or may the government instead satisfy *Turner* and compel all inmates to comply with each generally-applicable prison regulation by showing that the regulation is rationally related to the government's legitimate penological interests for the prison population as a whole?

PARTIES TO THE PROCEEDING

Petitioners are Reginald Wilkinson, Harry Russell, Curtis Wingard, Bobby Couch, David Gardener, Jack Walker and Ron Half, each of whom works for the State of Ohio in the Ohio Department of Rehabilitation and Correction.

Respondent is an inmate at the Ross Correctional Institution in Chillicothe, Ohio.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of defendants Reginald Wilkinson, Harry Russell, Curtis Wingard, Bobby Couch, David Gardener, Jack Walker, and Ron Half, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 241 F.3d 475. Pet. App. 1a-32a. The opinions of the district court are unreported. Pet. App. 35a-42a and 43a-48a. The

report and recommendation of the magistrate judge is unreported. Pet. App. 49a-67a.

JURISDICTION

The court of appeals entered judgment on February 22, 2001. The court of appeals denied a timely petition for rehearing on May 25, 2001. Pet. App. 33a-34a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . prohibiting the free exercise [of religion]."

2. The Fourteenth Amendment to the United States Constitution states, in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Respondent filed suit under 42 U.S.C. 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

4. Section 5120-9-25(F) of the Ohio Administrative Code imposes regulations for the "[a]ppearance and grooming of male inmates" in Ohio's prisons, and states: "Sideburns, beards, and moustaches must be neatly trimmed. Facial hair must not protrude more than one-half inch from the skin."

INTRODUCTION

This petition presents an important question about prison administration on which the circuit courts of appeals are now divided. The question is whether state prison officials must justify the enforcement of generally-applicable rules on a case-by-case basis whenever a prisoner challenges one of those rules. In this case, the court of appeals held that a prisoner may seek injunctive relief to block the enforcement of a prison regulation whenever state officials have not shown that the particular prisoner-plaintiff poses the kind of security risk that the regulation is designed to prevent. The court's willingness to let the prisoner's suit proceed in this case, notwithstanding the fact that the regulation he challenges on free-exercise grounds is generally-applicable, religion-neutral and entirely reasonable for the prison population as a whole, is in direct conflict with the ruling of all other circuit courts of appeals on this same issue.

Those other courts have held – and properly so – that a prison regulation valid on its face can be enforced across the board against all prisoners, whether or not each of them poses a particular danger of the type that the regulation is designed to prevent. The reasoning of those other courts is

sound – and the conflicting approach of the Sixth Circuit is unsound – for a very practical reason: state prison officials are ill-equipped to implement general regulations in a patchwork pattern based on the individual dangers posed by each prisoner, and any effort to impose on each prisoner only those regulations deemed reasonably necessary to keep each particular prisoner in line is simply not feasible in large state prisons where typically hundreds of regulations apply. Indeed, the very process of exempting some prisoners from rules that others must follow creates in the prison setting the type of resentment among the inmates that prison officials try to lessen by imposing regulations that treat all prisoners alike.

In ruling as it has, the court of appeals has ignored this Court's directive that rigorous scrutiny is simply "not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." *Thornburgh v. Abbott*, 490 U.S. 401, 410 (1989). Time and again, this and lower federal courts have explained that "separation of powers concerns counsel a policy of judicial restraint" when prison policies designed by the other branches of government are under attack. *Turner v. Safley*, 482 U.S. 78, 85 (1987). The approach of the court of appeals turns that "deference to the appropriate prison authorities," *id.*, on its head, subjecting state officials to suit in the federal courts whenever any particular inmate objects to the imposition on him of a generally-applicable prison regulation.

Because the appellate court's errant approach mistakenly forces state prison officials to design individualized rules tailored to each inmate's own level of dangerousness, and because that approach stands as an outlier next to the proper approach followed in other federal

courts, we respectfully ask the Court to grant certiorari in this case.

STATEMENT

Respondent Hbrandon Lee Flagner is an Ohio prison inmate who seeks monetary damages and an injunction barring state officials from cutting his facial hair. Flagner, who has been imprisoned since 1986, became an Orthodox Hasidic Jew in 1991, and he alleges that his religious faith prohibits him or others from shaving or cutting his beard.

The various state officials whom Flagner has sued under 42 U.S.C. 1983 do not dispute the sincerity of Flagner's religious beliefs, and do not question the relevant tenets of his religious faith. However, Ohio's religion-neutral prison regulations direct that inmates' facial hair "must not protrude more than one-half inch from the skin," Ohio Admin. Code 5120-9-25(F), and state that hair on the scalp must be no "more than three inches" in length. Ohio Admin. Code 5120-9-25(D). Prison officials' efforts to force Flagner to comply with this hair-length restriction prompted his lawsuit in 1996.

Both Flagner and the defendant state officials sought summary judgment in the district court. In ruling on the parties' motions, the magistrate judge applied *Turner v. Safley*, 482 U.S. 78, 89 (1987), which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Thus, in weighing the merits of Flagner's First Amendment free-exercise claim, the magistrate judge considered the penological interests supporting Ohio's hair-length regulation.

The defendant state officials argued that the regulation furthers legitimate penological interests by (1) preventing inmates from hiding drugs or weapons in their beards, (2) eliminating extra staff time spent checking for those items, (3) controlling the use of long hair or beards as gang symbols within state prisons, and (4) ensuring that inmates who escape from custody cannot alter their appearance quickly by cutting previously-lengthy hair or beards. Pet. App. 60a-63a. The magistrate judge concluded that genuine factual disputes existed on those claims, so he recommended that both Flagner's and the defendants' summary judgment motions be denied. Pet App. 67a.

The district court adopted the magistrate judge's recommendation, agreeing that a jury should decide whether Ohio's hair-length regulations are "reasonably related to legitimate penological interests," even though the court of appeals had rejected two earlier First Amendment challenges to those very regulations. Pet. App. 46a-47a.

The defendant state officials then filed a second summary judgment motion, arguing that they are entitled to qualified immunity on Flagner's claim for monetary damages. The district court again denied the motion, finding that "material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff." Pet. App. 40a.

The defendant state officials then appealed. The court of appeals held, as had the district court, that Ohio officials were required to show that the hair-length regulation was "reasonably related to legitimate penological interests." Pet. App. 11a (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). But in weighing whether state officials had violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known," *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982), the district court had erred, according to the court of appeals. Pet. App. 13a. Noting that the court of appeals itself had previously upheld an earlier version of the Ohio prison grooming regulation in a case involving a Lakota American Indian, see *Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988), the court of appeals concluded that the defendant state officials in this case had not violated a "clearly established" right by likewise insisting that Flagner cut his beard. Pet. App. 14a. The court of appeals therefore concluded that the defendant state officials were entitled to qualified immunity on Flagner's claim for money damages, and so reversed the district court's denial of the defendants' second summary judgment motion on that claim.

Turning to Flagner's claim for declaratory and injunctive relief, however, the court of appeals found that Flagner had "presented sufficient evidence to raise questions about the validity of the defendants' asserted penological interests." Pet. App. 16a. The court of appeals found at least some of the security and staffing concerns offered by the defendant state officials in support of the hair-length regulation to be "facially appealing," Pet. App. 19a, but found those concerns unjustified in this case, because Flagner himself had never posed a security threat. See Pet. App. 18a ("no contraband has ever been recovered by prison staff during any search of his beard and sidelocks"); Pet. App. 19a ("no additional staff members were ever hired and no overtime was ever authorized to accommodate increased security demands caused by Flagner"); Pet. App. 20a ("there is no evidence in the record that Flagner's beard and sidelocks have ever been mistaken for a 'gang identifier'"); Pet. App. 21a ("there is no evidence in the record that he has ever attempted to escape from prison").

Concluding that the defendant state officials "may be exaggerating their response to the potential security threats" posed by long facial hair because Flagner himself had never posed a security concern, the court of appeals found that Flagner had "called into question the credibility" of the state officials' concerns, and so he was entitled to have a jury hear his claims for declaratory and injunctive relief. Pet App. 23a-24a. The court of appeals remanded the case for further proceedings on Flagner's claims for declaratory and injunctive relief.

Judge Nelson dissented. Though he agreed that qualified immunity barred Flagner from pursuing his claim for damages against the defendant state officials, he argued that summary judgment for the defendants was warranted on Flagner's remaining claims as well. Judge Nelson challenged the appellate court's conclusion that the "reasonably related to legitimate penological interests" test from *Turner*, 482 U.S. at 89, should be, in Judge Nelson's words, "tailored to the plaintiff's individual circumstances" as the court's approach in this case suggests. Pet. App. 27a. Noting that Ohio's prison inmate population was 45,540 as of January 2001, Judge Nelson argued that state prison officials ought to be free to apply religion-neutral regulations like the Ohio hair-length requirement to all prisoners without having to justify those regulations on a "case-by-case basis." Pet. App. 28a, 32a.

REASONS FOR GRANTING THE PETITION

The Court should review the judgment below for three reasons. First, the decision of the court of appeals conflicts with decisions from other circuits. Second, the appellate court's decision is at odds with this Court's own precedents involving prisoners and the free exercise clause. Third, the judgment below will have a far-ranging effect on

prison operations, and will likely trigger a significant increase in prisoner lawsuits.

I. The Circuits Are Divided On The Question Presented.

The decision below has created a direct conflict on the question presented. Six other circuits (the District of Columbia Circuit and the Third, Fourth, Fifth, Eighth and Ninth Circuits) have adopted the exact opposite approach to the one chosen by the Sixth Circuit. Indeed, we have found no other decisions that agree with the Sixth Circuit's analysis of this important issue involving prisoner lawsuits. See *Amatel v. Reno*, 156 F.3d 192, 201 (D.C. Cir. 1998) (applying *Turner v. Safley* to a ban on funding for sexually explicit materials in federal prisons, and rejecting a "detailed prisoner-by-prisoner . . . sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner"); *id.* at 202-03 ("The question [under *Turner*] is not whether curtailment of pictorial smut *will* advance the prison's rehabilitative project, but whether Congress could reasonably have believed that it would do so."), *cert. denied*, 527 U.S. 1035 (1999); *Waterman v. Farmer*, 183 F.3d 208, 216, 217 (3rd Cir. 1999) (applying *Turner* to a ban on pornographic materials in a state prison, and rejecting a "case-by-case analysis" of the question because "as long as the statute is rational, it clears *Safley*'s first hurdle," and "New Jersey could rationally have seen a connection between pornography and rehabilitative values") (quotations omitted); *In re Long-Term Administrative Segregation of Inmates*, 174 F.3d 464, 470 (4th Cir. 1999) (applying *Turner* to prison director's designation of a religious group as a security threat, and explaining that "[a]llowing prison officials to act only after a demonstration of individual dangerousness would deprive them of the all-important option of prevention"), *cert. denied*, 528 U.S. 874

(1999); *Hicks v. Garner*, 69 F.3d 22, 24 (5th Cir. 1995) (rejecting Rastafari inmate's free-exercise challenge to prison's ban on long hair and beards, despite prisoner's claim that the ban should not have been applied to him because he was segregated from the general prison population, and so, he claimed, "the penological interests of safety and identification do not apply to him" and "serve no valid purpose"); *Herlein v. Higgins*, 172 F.3d 1089, 1091 (8th Cir. 1999) (applying *Turner* in rejecting a prisoner's challenge to a state prison ban on the possession of music cassettes carrying warnings about explicit lyrics, explaining that "nothing in our cases . . . requires actual proof that a legitimate interest will be furthered by the challenged policy"); *Thompson v. Souza*, 111 F.3d 694, 702-03 (9th Cir. 1997) (rejecting a prisoner's attack on prison strip search and drug testing policy where the prisoner himself had no history of drug abuse).

The conflict exists not only on the general issue of the type of review that *Turner* demands for prison regulations, but also on the particular regulation that the court of appeals studied, for several other circuits have rejected challenges to prison hair-length policies. See *Fromer v. Scully*, 874 F.2d 69, 74-76 (2nd Cir. 1989) (rejecting prisoner's challenge to a hair-length regulation); *Cole v. Flick*, 758 F.2d 124, 130-31 (3rd Cir. 1985) (same), *cert. denied*, 474 U.S. 921 (1985); *Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 358 (4th Cir. 1998) (same); *Green v. Polunsky*, 229 F.3d 486, 490-91 (5th Cir. 2000) (same); *Hamilton v. Schriro*, 74 F.3d 1545, 1554-55 (8th Cir. 1996) (same), *cert. denied*, 519 U.S. 874 (1996); *Friedman v. Arizona*, 912 F.2d 328, 331-33 (9th Cir. 1990) (same), *cert. denied*, 498 U.S. 1100 (1991); *Hall v. Bellmon*, 935 F.2d 1106, 1114 (10th Cir. 1991) (same); *Harris v. Chapman*, 97 F.3d 499, 503-04 (11th Cir. 1996) (same), *cert. denied*, 520 U.S. 1257 (1997). And those other circuits have done so even in the absence of any evidence

that the plaintiff-prisoners had engaged in the misconduct that the regulations sought to prevent. See, e.g., *Fromer*, 874 F.2d at 75 (upholding beard-length regulation for prisoners even though state officials "could offer no examples of contraband discovered in inmates' beards," and rejecting the view that prison administrators are "obliged to wait passively for inmates to disrupt prison security before acting"); *Cole*, 758 F.2d at 131 (upholding hair-length regulation for prisoners, explaining that "the mere fact that the Commonwealth did not provide documentary support for the opinions testified to by its experts is not a sufficient basis for the [district] court to have concluded that the proffered justification is unreasonable"); *Friedman*, 912 F.2d at 332 (upholding prison no-beard policy that state officials had justified "on the basis of anticipated security problems," explaining that "requiring concrete evidence to support the regulation . . . would create a conflict with *Turner*").

In ruling that the federal courts should weigh on a case-by-case basis any legal challenges to generally-applicable (and religion-neutral) prison regulations like Ohio's beard-trimming requirement, the court of appeals has departed from the uniform course set by other lower courts. The issue is an important one, and it merits review now.

II. The Decision Below Conflicts With This Court's Own Precedents.

The individualized case-by-case approach called for by the court of appeals in cases involving the validity of prison regulations runs counter to this Court's own precedents. The Court has consistently recognized that "[s]ome latitude in anticipating the probable consequences of allowing certain [conduct] . . . in a prison environment is essential to the proper discharge of an administrator's duty." *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989) (quoting

Procunier v. Martinez, 416 U.S. 396, 414 (1974)). And the Court has just as consistently rejected the suggestion that those officials may not act to address perceived dangers until they "can compile a dossier" demonstrating the necessity for specific preventive actions. *Bell v. Wolfish*, 441 U.S. 520, 551 n.32 (1979) (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 133 (1977)).

Likewise, the appellate court's focus on respondent Flagner's behavior in prison, and the court's conclusion that he therefore need not necessarily comply with prison regulations designed to avert misbehavior generally among the prison population, does not square with this Court's view that "prison administrators necessarily draw on more than the specific facts surrounding a particular incident" in the process of "assessing the seriousness of a threat to institutional security." *Hewitt v. Helms*, 459 U.S. 460, 474 (1983). This Court has therefore "rejected the case-by-case approach to the 'reasonableness' inquiry in favor of an approach that determines the reasonableness of contested practices in a categorical fashion." *Hudson v. Palmer*, 468 U.S. 517, 538 (1984) (O'Connor, J., concurring). See also *Turner*, 482 U.S. at 91-92 (holding that a ban on inmate-to-inmate correspondence was rationally connected to the goals of maintaining security and suppressing gang activity, without requiring specific evidence that such correspondence had led to violence or gang activity in the past).

The approach of the court of appeals undermines the ability of prison officials to impose generally-applicable, proactive security measures, for evidently they must now decide whether those measures should apply to each prisoner based on that prisoner's past record while incarcerated. That is just the approach already rejected by this Court in *Lewis v. Casey*, 518 U.S. 343 (1996). In that case, as here, a district court had struck a generally-applicable prison regulation,

holding that it could be enforced "[o]nly if prison administrators c[ould] 'documen[t]' an individual prisoner's" past history of misconduct. *Id.* at 391 (Thomas, J., concurring). This Court rejected that "'one free bite' approach," *id.*, yet the court of appeals has now revived that notion, holding that Flagner need not comply with prison regulations until prison officials demonstrate that he in particular poses a security risk.

The decision below contradicts this Court's free-exercise precedents as well. In *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986), the Court disapproved the view that "the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments create a 'clear danger' of undermining" military interests. Though the serviceman in that case "argue[d] that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline," and though he faulted the Air Force for citing "no support from actual experience or a scientific study in the record" that might demonstrate the importance of the military's dress regulations, this Court described those arguments as "quite beside the point." *Id.*, 475 U.S. at 509. The Court explained that the decision about those dress regulations was a matter for the "appropriate military officials" to decide, even if the "military's perceived need for uniformity" has the "effect . . . [of] restrict[ing] the wearing of the headgear required by" some service members' religious beliefs. *Id.*, 475 U.S. at 510.

The same is true here, for just as the Air Force in that case did not need to prove that granting a religious exemption to the serviceman would hamper the military's legitimate objectives, and just as the Air Force likewise did not need to wait until that serviceman himself had hampered those objectives before compelling him to comply with the dress

regulations, so Ohio prison officials ought not be forced to justify to a federal court their efforts to enforce the beard-length restriction against respondent Flagner. The strong deference afforded by the Court to the military officials in *Goldman* should apply no less to the prison administrators in this case.

And of course the Court held in an oft-cited free-exercise case that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Employment Division v. Smith*, 494 U.S. 872, 886 n.3 (1990). Resolving free-exercise questions differently could very well force judges to "weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890. That alternative approach – one seemingly adopted by the court of appeals in this case – is all the more troubling in the prison context, where this Court has said that the federal courts should not be "the primary arbiters of what constitutes the best solution to every administrative problem," and where government regulations are not subject to a "strict scrutiny" or "least restrictive alternative" test. *Turner*, 482 U.S. at 89, 90.

No doubt, the government's prison regulations – including those that impact some prisoners' religious activities or beliefs – should be reasonably tied to legitimate government interests. But the appellate court's view that no such general regulation may be enforced against a prisoner until the government shows that the regulation is warranted for that particular prisoner simply is not supported by this Court's past decisions. The "*Turner* factors concern only the relationship between the asserted penological interests and the prison regulation," *Shaw v. Murphy*, 121 S. Ct. 1475, 1480 (2001), rather than the relationship between the prisoner's particular circumstances and the regulation.

Flagner seeks, and the court below granted, a privilege not afforded to ordinary citizens outside the prison setting. Though no motorist on the road can rightly argue that he should be exempt from obeying speed limits or other traffic laws until the government proves that he in particular poses a danger on the highways, that is just the argument that Flagner makes – and that the court of appeals has adopted – in his effort to avoid compliance with Ohio's beard-trimming regulation for state prisoners. This Court has never adopted that approach when reviewing prisoners' rights cases, and because the judgment below has done so, this case deserves review.

III. The Appellate Court's Judgment Will Impact Prisons, Jails and Courts Significantly.

Aside from the new legal course that the judgment below charts for the handling of prisoner lawsuits, that judgment carries significant real-world adverse consequences for prison administrators. Though prison officials generally aim to "anticipate security problems," *Turner*, 482 U.S. at 89, in order to prevent those problems from occurring in the first place, the approach of the court of appeals turns that goal on its head, forcing prison officials to act only in response to documented security problems on an individual-inmate basis.

That reactive-not-proactive approach to rule-making and rule-enforcement in the prison context is both dangerous and unworkable. More than 137,000 inmates are housed in the public prisons of the four States in the Sixth Circuit. A. Beck and P. Harrison, *Prisoners in 2000* (Bureau of Justice Statistics, U.S. Dept. of Justice 2001) at 3, 7. According to the court of appeals, any generally-applicable regulation to which any of those prisoners objects must be tailored to match closely that particular prisoner's past

history. That individual tailoring of regulations will sap state resources and manpower, and will undercut the enforcement of all but the most innocuous of state regulations. If prison officials must justify their efforts to shave the beards and clip the hair of each prisoner, those officials will likewise have little power in other areas of prison management as well.

And the mere act of exempting certain prisoners from general regulations in the prison context poses its own concerns for state officials. "[S]pecial arrangements for one group would create problems as other inmates . . . [would] perceive favoritism," thereby causing "undesirable results in the institution." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (quotations omitted). If the judgment below stands, many state prison officials may well forgo the enforcement of some restrictions entirely, rather than battling prisoners on a case-by-case basis, leaving some prisoners resentful and others defiant when the restrictions are imposed on some but not others. That outcome will in turn leave all prisoners and staff at greater risk due to the overall diminution in security caused by the administrators' inability to enforce regulations – like Ohio's hair-length rule – that the administrators deem important.

Moreover, prison restrictions far afield from the First Amendment free-exercise context will be affected by the decision of the court of appeals. This Court's *Turner* decision, on which the Sixth Circuit's judgment purports to rest, applies "in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment," because "the standard of review . . . adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). The approach adopted below will therefore control such legally diverse and operationally

sensitive matters as search policies, library access, visiting procedures, drug testing, inmate housing and job assignments.

Even beyond prison walls, the judgment below will impact the federal courts themselves. With more than 137,000 inmates housed in prisons and jails in the States of the Sixth Circuit, if just *one percent* of those prisoners sue – like respondent Flagner – for an exemption from enforcement of one or more disagreeable prison regulations, more than 1,300 new suits will be filed in the district courts of the Sixth Circuit. That total would more than double the number of prisoner suits pending in those courts. L. Meachum, *Judicial Business of the United States Courts: 2000* (Administrative Office of the U.S. Courts 2001), 150 Table C-3A (showing 1,009 prisoner civil rights and conditions cases pending in the district courts of the Sixth Circuit). That troubling – but entirely likely – result warrants the attention of this Court now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2001

(2)

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-4145

HBRANDON LEE FLAGNER,
Plaintiff-Appellee,

v.

REGINALD WILKINSON, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 96-00887 – Susan J. Dlott, District Judge.

Argued: October 16, 2000

Decided and Filed: February 22, 2001

Before: NELSON and MOORE, Circuit Judges; WILHOIT, District Judge.*

COUNSEL

ARGUED: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION,

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* The Honorable Henry R. Wilhoit, Jr., Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

Columbus, Ohio, for Appellants. Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellee. **ON BRIEF:** Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellants. Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellee.

MOORE, J., delivered the opinion of the court, in which WILHOIT, D. J., joined. NELSON, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. The plaintiff, Hbrandon Lee Flagner, filed a 42 U.S.C. § 1983 action alleging that an Ohio prison grooming regulation violated his constitutional right to practice his religion. The defendants ask this court to reverse the district court's order denying the defendants' summary judgment motion based on qualified immunity, arguing that Flagner has not alleged a constitutional violation and that the regulation has a valid penological basis. Based on our precedent in *Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988), we **REVERSE** the district court's denial of the defendants' motion for summary judgment based on qualified immunity. We also conclude that Flagner may bring an as-applied challenge to the Ohio prison grooming regulation and that there is a factual dispute on the issue of whether the defendants have a valid penological interest. Accordingly, we **REMAND** to the district court so that

Flagner's claims for declaratory and injunctive relief may proceed.

I. BACKGROUND

Flagner has been incarcerated with the Ohio Department of Rehabilitation and Correction (ODRC) since 1986. Flagner is a practicing Orthodox Hasidic Jew who brought a § 1983 suit against prison officials challenging the enforcement of Ohio Administrative Code §§ 5120-9-25 (D) and (F),[1] a prison grooming regulation which requires Flagner to cut his beard and sidelocks, also referred to as

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[1] Ohio Administrative Code § 5120-9-25(D) provides the following:

> Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. *Hair and hairstyle shall not protrude more than three inches from the scalp.* Braids and plaits may be worn subject to the limitations of this rule. The following hairstyles or facial hair are not permitted: Initials, symbols, dyes, multiple parts, hair disproportionately longer in one area than another (excluding natural baldness), weaves, wigs, dreadlocks and shaved heads. Other hairstyles not specifically listed herein may be prohibited if they are determined to be either a threat to security or contrary to other legitimate penological concerns.

Ohio Admin. Code § 5120-9-25(D) (2000) (emphasis added). Subsection (F) provides, "[s]ideburns, beards, and moustaches must be neatly trimmed. *Facial hair must not protrude more than one-half inch from the skin.*" Ohio Admin. Code § 5120-9-25(F) (2000) (emphasis added).

"peos," in contravention of the tenets of his religious faith.[2] The defendants are ODRC employees who work at either the

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[2] *The Code of Jewish Law*, Chapter 170, entitled "The Prohibition Against Shaving the Corners of One's Head and Beard" provides the following:

> 1. [Leviticus 19:27 states: "Do not cut off [the hairs of] the corners of your heads and do not destroy the corners of your beards." Our Sages explain that] there are two "corners of the head," the place at which the skull is attached to the jawbone, near the ear at both the right and left sides of the head. [Shaving the hair off the "corners" is forbidden.]
>
> There are certain opinions that forbid cutting off the hair with scissors if it is done as effectively as if it were done with a razor – *i.e.*, removing all the hair, even that which is closest to the flesh. Therefore, if one is required to remove one's hair for medical reasons, one should be careful not to remove the hair closest to the flesh.
>
> *The area that is forbidden to be shaved extends from the hair on one's temples to below the ear, the place from which the lower jaw protrudes.*
>
> 2. The Torah forbade "destroying" the corners of the beard only with a razor. [Our Sages spoke of] five corners; [their definition, however, is a matter of question] and there are many opinions in this regard. Therefore, a God-fearing person should not pass a razor over his beard at all. [This includes] also his mustache and the hair below the chin.
>
> There is no difference between a razor and a sharp stone that cuts hair, *e.g.*, pumice stone. When using a

Lebanon Correctional Institution (LeCI) or the Madison Correctional Institution (MaCI). Flagner was imprisoned at LeCI from July 8, 1994 to November 20, 1996, and transferred shortly thereafter to MaCI. Prior to his transfer to LeCI, Flagner resided at the Mansfield Correctional Institution. He is currently incarcerated at Ross Correctional Institution.

In 1987, Flagner began studying Judaism and formally converted to Orthodox Judaism in 1991 while incarcerated at the Mansfield Correctional Institution. His religious affiliation has been recognized by the defendants and is not in dispute in this case. Flagner testified during the preliminary injunction evidentiary hearing held on December 3, 1996, that between 1991 when he converted to Judaism and prior to his transfer to LeCI in 1994, Mansfield prison officials did not make any effort forcibly to cut his beard or sidelocks. In fact, a period of five years passed between the time Flagner converted to Orthodox Judaism in 1991 until his first forced cutting in 1996.

On January 26, 1996, Flagner was given a direct order by Defendant Bobby Couch of LeCI, to comply with the grooming regulation, but Flagner refused, stating his religious tenets prevented compliance. On February 16, 1996, the Rule Infractions Board found Flagner guilty of disobeying the order and sentenced him to time in a disciplinary isolation

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> salve to remove one's beard – *e.g.*, a mixture containing lime – one should be careful not to scrape off the substance with a knife, lest one cut off some hair. Instead, one should scrape it off with a sliver of wood or the like.

Joint Appendix ("J.A.") at 140 (Pl.'s Ex. 4, Mem. from Aleph Inst. regarding Jewish Law) (emphasis added).

unit. On June 21, 1996, Flagner received another direct order from Defendant Couch to comply with the grooming regulation. Flagner then filed a grievance on June 28, 1996, which was reviewed by Defendant David Gardner, Inspector of Institutional Services, on July 11, 1996. In his disposition, Defendant Gardner stated that Flagner was in violation of § 5120-9-25(D) and was required to comply with the regulation. Failure to comply would subject Flagner to "appropriate disciplinary action [] [w]hich may include requiring [Flagner's] hair to be cut or trim[med] against [his] will." Joint Appendix ("J.A.") at 135 (Disposition of Grievance Form). Flagner continued to refuse to comply with the regulation. On July 29, 1996 and in April 1998, the defendants forcibly cut Flagner's beard and sidelocks. Between the time of Flagner's forced cuttings in July 1996 and April 1998, the defendants exempted him and four Native American inmates from the grooming regulation.

Defendant Curtis Wingard, the warden of MaCI testified in his deposition that exempting Flagner from the grooming regulation did not pose additional security problems at MaCI; no additional security precautions were taken with Flagner in excess of the security measures taken with inmates who complied with the grooming regulation. Defendant Wingard also testified that MaCI has neither been required to provide additional security, nor to approve additional overtime to provide security for Flagner and the four Native Americans who were exempted from the grooming regulation. The defendants have only searched Flagner's beard on less than five occasions. These searches have typically involved the defendant running his own fingers through his beard and sidelocks; this process generally took two to three seconds to complete, and contraband has never been recovered from Flagner's beard.

II. PROCEDURAL HISTORY

On September 6, 1996, Flagner filed a pro se § 1983 action against the Director of ODRC and the warden of LeCI where he was then incarcerated, alleging violations of his religious rights. On January 3, 1997, Flagner filed an amended complaint to include allegations against the warden at MaCI. The magistrate judge held an evidentiary hearing on January 9, 1997 regarding Flagner's motion for a preliminary injunction to prevent the defendants from forcibly cutting his beard and sidelocks. On January 14, 1997, the magistrate judge recommended granting Flagner's motion for preliminary injunction. The district court reversed the magistrate judge's Report and Recommendation and denied Flagner's motion in an order filed on August 8, 1997. The defendants moved for summary judgment on March 27, 1998, and Flagner filed a cross motion for partial summary judgment on June 8, 1998. On February 3, 1999, the magistrate judge entered a Report and Recommendation denying both the defendant's motion for summary judgment and Flagner's cross motion for summary judgment, which the district court adopted in an order dated March 29, 1999.

On May 13, 1999, the defendants filed a second motion for summary judgment based on qualified immunity which is at issue in the present case. On August 24, 1999, the district court entered an order denying the defendant's motion because "[a] reasonable prison official would have known in 1996 that he could not cut Flagner's beard and sidelocks in contravention of his sincerely held religious beliefs in the absence of legitimate penological interests relating to the enforcement of the hair length regulation."[3]

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[3] The district court also incorporated by reference the facts and analysis of the *Turner* factors, contained in the Report and Recommendation filed on February 3, 1999, J.A. at 144-

J.A. at 236-37 (D. Ct. Order of 8/24/99). The defendants timely filed their Notice of Appeal on September 20, 1999.

III. ANALYSIS

A. Jurisdiction

This court has jurisdiction over the appeal from the district court's order because denial of summary judgment based on qualified immunity is an immediately appealable collateral order. *See Mattox v. City of Forest Park*, 183 F.3d 515, 518 (6th Cir. 1999) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), which categorized the denial of qualified immunity as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). In *Johnson v. Jones*, a unanimous Supreme Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

B. Denial of Qualified Immunity

The determination of whether qualified immunity applies to an official's actions is a legal determination that we review de novo. *See Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996). A motion for summary judgment will be granted if the evidence presented to the court demonstrates that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477

57, and the March 29, 1999 district court Order adopting it. *See* J.A. at 234 (D. Ct. Order of 8/24/99).

U.S. 242, 247-48 (1986). We must not weigh the evidence, but rather we must only determine whether there is a factual dispute that precludes summary judgment. *See Liberty Lobby*, 477 U.S. at 249.

In *Harlow v. Fitzgerald*, the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects public officers "from undue interference with their duties and from potentially disabling threats of liability." *Id.* at 806. In *Butz v. Economou*, the Supreme Court explained that "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of [qualified] immunity." *Butz v. Economou*, 438 U.S. 478, 508 (1978).

As we explained in *Dickerson*, the first step in determining if the defendants are entitled to qualified immunity is to examine "whether, based on the applicable law, a constitutional violation occurred." *Dickerson*, 101 F.3d at 1157. If a constitutional violation is found, we next consider whether the violation involved "clearly established constitutional rights of which a reasonable person would have known." *Id.* at 1158 (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995)). To determine whether a constitutional right is "clearly established," we "'look first to the decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits.'" *Id.* (quoting *Buckner v. Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994) (citation omitted)). Under this framework, to plead a proper claim under 42 U.S.C. § 1983, "a plaintiff must identify a right

secured by the United States Constitution and the deprivation of that right by a person acting under color of state law," *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992), such that "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

After determining that a constitutional right is clearly established, the final step in our qualified immunity analysis is to inquire "whether the plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what [the official] allegedly did was objectively unreasonable in light of [the] clearly established constitutional rights." *Dickerson*, 101 F.3d at 1158 (quoting *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994)). "Summary judgment is not appropriate if there is a genuine factual dispute relating to whether the defendants committed acts that allegedly violated clearly established rights." *Id.*

Turning to the first prong of our qualified immunity analysis, we must ask whether a constitutional violation occurred. The Supreme Court has recognized that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Specifically, the Supreme Court has held that inmates retain First Amendment rights, *see Pell v. Procunier*, 417 U.S.817, 822 (1974), including the right to free exercise of religion. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (concluding that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty"). A prisoner alleging that the actions of prison officials violate his religious beliefs must show that "the belief or practice asserted is religious in the person's own scheme of things"

and is "sincerely held." *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987).

In this case, the sincerity of Flagner's religious beliefs is not in dispute. Flagner alleges that application of §§ 5120-9-25(D) and (F) violated his First Amendment free exercise rights. He asserts that despite his efforts to prevent prison officials from violating the tenets of his religious faith, the defendants forcibly cut his beard and sidelocks in 1996 and 1998.

The Supreme Court has held that in most circumstances, prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Wolfish*, 441 U.S. at 547. "To ensure that courts afford appropriate deference to prison officials," the Supreme Court has "determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). In *Turner v. Safley*, the Supreme Court articulated the proper standard as follows: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

We agree with the district court's conclusion in its March 23, 1999 Order adopting the magistrate judge's Report and Recommendation that the proper standard to apply in prisoner cases challenging restrictions on the free exercise of religion is supplied by the Supreme Court's decision in *Turner*, not by *Employment Division, Department of Human*

Resources of Oregon v. Smith, 494 U.S. 872 (1990).[4] In *Smith*, the Supreme Court concluded "that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Id.* at 886 n.3. Following the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA) which was later held unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). As the district court and magistrate judge correctly recognized, after the *Boerne* decision, our Circuit has consistently applied the pre-RFRA standard set forth in *Turner* to evaluate challenges by prisoners to restrictions on the free exercise of religion. *See, e.g., Spies v. Voinovich*, 173 F.3d 398, 403 (6th Cir. 1999) (applying the *Turner* standard to evaluate First Amendment free exercise challenges to prison regulations).

As we explain in Part C, we believe that Flagner has presented sufficient evidence that application of the grooming regulation would violate his constitutional rights. We agree with the district court that "material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns." J.A. at 236 (D. Ct. Order of 8/24/99). Under the Supreme Court's decision in *Johnson* we would not be able to exercise appellate jurisdiction because the Court has held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a

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[4] This Order dated March 23, 1999 was listed in the defendants' Notice of Appeal but was not included by the parties in the Joint Appendix.

district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20. In this case, with respect to the first prong of the qualified immunity analysis, there are genuine issues of material fact as to whether a constitutional violation occurred.

Our qualified immunity analysis, however, does not end here. We must now consider the district court's legal conclusion that "[a]t the time of plaintiff's initial forced haircut in 1996, the law was *clearly established* that prisoners retain the right to religious freedom and that prison officials may not deny inmates a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." J.A. at 235 (D. Ct. Order of 8/24/99) (quotation omitted) (emphasis added). In light of our decision in *Pollock*, we hold that the district court erred in concluding that the law was clearly established.

Flagner bears the burden "to allege and prove that the defendant official violated a clearly established constitutional right." *Buckner*, 36 F.3d at 539. In *Pollock v. Marshall*, we upheld the application of an earlier version of the challenged Ohio prison grooming regulation in an action involving a Lakota American Indian who sought to enjoin prison officials from cutting his hair in violation of his religious beliefs. *See Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988). We held that "[a]fter balancing the defendant's interest in keeping prisoners' hair short against the right of the plaintiff to exercise the religion of the Lakota Indians, . . . the regulation restricting hair length, *as applied* to the plaintiff, is not unconstitutional." *Id.* (emphasis added). The defendants in *Pollock* raised several legitimate penological concerns such as, "[q]uick

identification, removal of a place to hide small contraband, prevention of sanitation problems," and increased risk of sexual attacks on inmates with longer hair because "[l]onger hair increases the attractiveness of an inmate to other inmates." *Id.* at 659.

Although *Pollock* involved a challenge by a Lakota American Indian to an earlier version of § 5120-9-25(F) and in this case, Flagner, an Hasidic Orthodox Jew, brings a challenge to the current §§ 5120-9-25(D) and (F), "it need not be the case that 'the very action in question has previously been held unlawful." *Dickerson*, 101 F.3d at 1158 (quoting *Anderson*, 483 U.S. at 640). To deny qualified immunity protection to the defendants, the law requires that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson*, 483 U.S. at 640).

Based on our decision in *Pollock* which upheld an application of the challenged prison regulation, we conclude that Flagner's right to grow his beard and sidelocks in contravention of the Ohio prison grooming regulation at the time of his forced cutting was not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Russo*, 953 F.2d at 1042 (quoting *Anderson*, 482 U.S. at 640). We also recognize that our decision in *Pollock* has been followed in several unpublished opinions upholding the application of the Ohio prison grooming regulation at issue in this case. Because Flagner has not satisfied his burden to establish that the "defendant official[s] violated a clearly established constitutional right," *Buckner*, 36 F.3d at 539, the defendants are entitled to qualified immunity solely with respect to Flagner's money damages claims. It is thus unnecessary for us to consider the final prong of the qualified immunity analysis. Accordingly, we **REVERSE** the district court's denial of summary judgment to the defendants based on qualified immunity.

C. Declaratory and Injunctive Relief

The defense of qualified immunity protects officials from individual liability for money damages but not from declaratory or injunctive relief. *See Collyer v. Darling*, 98 F.3d 211, 228 n.18 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997); *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992). Thus, our reversal of the district court's denial of summary judgment based on qualified immunity does not preclude Flagner from going forward with his as-applied challenge to the Ohio prison grooming regulation insofar as he seeks declaratory and injunctive relief. "In considering a challenge to a prison policy as applied, the proper inquiry is whether the actions of the prison officials are reasonably related to legitimate penological interests." *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 103 (6th Cir. 1991), *cert. denied*, 503 U.S. 989 (1992) (citing *Thornburgh v. Abbott*, 490 U.S. 401 (1989)).

Flagner seeks declaratory and injunctive relief to prevent the defendants from forcibly cutting his beard and sidelocks in the future. Although we relied on our decision in *Pollock* to conclude here that the defendants are entitled to qualified immunity with respect to Flagner's damages claims, our holding in *Pollock* does not necessarily resolve the question of whether the defendants may in the future, continue forcibly to cut Flagner's beard and sidelocks.

Inmates retain rights to free exercise of religion. Prison officials may impinge on these constitutional rights only if the regulation "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. While courts should generally defer to the expertise of prison officials in matters involving prison administration, this deference is only afforded "in the absence of substantial evidence in the

record to indicate that the officials have exaggerated their response." *Wolfish*, 441 U.S. at 548. The plaintiff here, unlike the plaintiff in *Pollock* who did not challenge the factual underpinnings of the prison officials' justifications, has presented sufficient evidence to raise questions about the validity of the defendants' asserted penological interests.

As the Supreme Court directed in *Turner v. Safley*, courts employ a four-factor analysis to determine whether a prison regulation is reasonably related to legitimate penological interests.[5] *See Spies*, 173 F.3d at 403 (citing

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[5] Judge Nelson's reliance on *Spies v. Voinovich*, 173 F.3d 398, 403-04 (6th Cir. 1999), for the proposition that under *Turner*, courts are not to subject challenged prison regulations to "a four-factor analysis tailored to the plaintiff's individual circumstances" ignores controlling Supreme Court precedent. In *Thornburgh v. Abbott*, the Supreme Court considered both a facial and an as-applied challenge to a federal prison regulation concerning the receipt of subscription publications by inmates. *See Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989). Applying the *Turner* analysis, the Court concluded that the prison regulation at issue was facially valid; however, the Court remanded to the district court for further examination of the plaintiffs' as-applied challenges concerning 46 publications introduced at trial. *Id.* at 404. Under Judge Nelson's interpretation of *Turner*, as-applied challenges to prison regulations would be virtually impossible. The Supreme Court's decision in *Abbott*, however, demonstrates that under *Turner*, plaintiffs may pursue as-applied challenges to facially valid prison regulations.

Moreover, in *Spies*, we upheld the constitutionality of a prison regulation prohibiting inmate-led groups, concluding that *Turner* factors three and four "do not cut in favor of Spies, for he has also not demonstrated that the safety

Turner, 482 U.S. at 89). These factors are not necessarily weighed evenly, *see id.* at 403-04, but rather they are guidelines for the court to assess whether the prison officials' actions are reasonably related to a valid penological basis. *See Whitney v. Brown*, 882 F.2d 1068, 1076 (6th Cir. 1989). Under the first factor, the court must consider whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotation omitted). "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90.

The final three *Turner* factors should be balanced together. The second *Turner* factor to consider is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. The third *Turner* factor we consider "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff,

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concerns of prison officials related to accommodating his requests are exaggerated and does not offer any 'alternative means' by which prison officials can mollify their security concerns." *Spies*, 173 F.3d at 406. Thus, our own analysis in *Spies* demonstrates that "the plaintiff's individual circumstances" are indeed relevant in applying the *Turner* analysis. Unlike the inmate in *Spies*, Flagner has presented sufficient evidence that the prison officials' response to a supposed security concern was exaggerated. *See* discussion *infra* Part III.C.1. Flagner has also offered an alternative means which would accommodate his religious beliefs "at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 91; *see also* discussion *infra* Part III.C.2.

courts should be particularly deferential to the informed discretion of corrections officials." *Id.* With respect to the fourth *Turner* factor, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* Likewise, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91. However, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

1. *Turner* Factor One

In consideration of the first *Turner* factor, we now ask whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotation omitted). Defendant Wingard stated that the prison grooming regulation is necessary because "[l]ong hair and thick, full beards and sideburns provide good hiding places for such contraband as drugs and weapons." J.A. at 80 (Wingard Aff., ¶ 4). In the past, Defendant Wingard has recovered items such as tobacco, marijuana, and a razor blade from the hair of Ohio inmates. J.A. at 80 (Wingard Aff., ¶ 4). However, with respect to Flagner specifically, no contraband has ever been recovered by prison staff during any search of his beard and sidelocks.

The defendants next assert that the grooming regulation is necessary to promote their "compelling interest

in maintaining security within Ohio's prisons by freeing staff members from the increased demands on their time that would otherwise result from the more frequent, wide ranging and lengthier searches that would be necessary to attempt to control contraband." J.A. at 81 (Wingard Aff., ¶ 6). Defendant Wingard continued, "additional staff are simply not available to conduct the more frequent and time consuming searches that would be necessary if the Hair Length Regulations were not consistently enforced." J.A. at 82 (Wingard Aff., ¶ 7). Despite this facially appealing justification, Defendant Wingard conceded that no additional staff members were ever hired and no overtime was ever authorized to accommodate increased security demands caused by Flagner and the four Native American inmates when they were exempted from the regulation. J.A. at 260, 298 (Wingard Dep.). Moreover, the defendants are unaware of any additional security precautions that were ever taken on account of Flagner that exceeded the security precautions taken for inmates who complied with the hair length regulation. J.A. at 260 (Wingard Dep.). Defendant Wingard was also unaware of any security problems specifically attributed by prison staff to Flagner's beard and sidelocks. J.A. at 260 (Wingard Dep.).

The defendants also contend that the regulation "further[s] the compelling interest in maintaining security in Ohio's prisons by reducing the danger of injury to staff members and the tension that would otherwise follow from the increased close and/or physical contact resulting from the more frequent and more invasive searches that would be necessary to deal with contraband in inmates' hair." J.A. at 82 (Wingard Aff., ¶ 8). This rationale, however, is completely undermined by the fact that these cursory searches required minimal, if any, physical contact between the prison staff and Flagner, and involved Flagner running his own fingers through his beard and sidelocks, which took

approximately two to three seconds to perform. Furthermore, the defendants have only searched Flagner's beard and sidelocks on a few occasions. Assuming that "[t]he potential for injury to staff increases in direct proportion to the extent of their physical contact and physical proximity to inmates," J.A. at 82 (Wingard Aff., ¶ 8), given the minimal contact between the staff and Flagner and the infrequency of searches, which he essentially performs on himself, the risk of increased injury to the defendants caused by exempting Flagner from the regulation appears to be nominal.

Next, the defendants proffer that the grooming regulation is justified because it reduces gang activity by suppressing "gang identifiers." J.A. at 87 (Wingard Aff., ¶ 17). According to Defendant Wingard, the regulation promotes uniform appearance "that allows corrections officials to more readily detect the use of hair as an identifier"; moreover, "limitations on the quantity of hair on an inmate[]'s head limits the number of ways in which the hair style can be modified for use as an identifier." J.A. at 88 (Wingard Aff., ¶ 21). Although it may be true that the challenged grooming regulation, as a general matter, helps alleviate the proliferation of "gang identifiers," there is no evidence in the record that Flagner's beard and sidelocks have ever been mistaken for a "gang identifier."

Next, the defendants assert that the grooming regulation is needed to promote ready identification of escaped inmates. Allowing an inmate to grow "long hair or a thick, full beard can [permit the inmate to] dramatically alter his appearance upon escape by changing his hair and beard length and/or style." J.A. at 89 (Wingard Aff., ¶ 24). The defendants argue that it is administratively burdensome to update continually their record of inmate photographs if inmates were allowed to alter their appearance by growing long hair or thick facial hair. The defendants further contend

that "it is essential to distribute an accurate picture of an escapee as quickly as possible after an escape and having to distribute multiple pictures is more difficult." J.A. at 90 (Wingard Aff., ¶ 25).

The grooming regulation, however, does not completely prevent the risk of an escapee altering his own appearance after escaping from prison. With respect to Flagner specifically, there is no evidence in the record that he has ever attempted to escape from prison. In addition to a photograph of Flagner, the defendants also have on file four professionally-made sketches of him bearing various beard and sidelock lengths and one sketch of Flagner with no facial hair at all. In the event that Flagner ever escaped from prison, these sketches would help to identify him because they show a range of his possible appearances.

Finally, the defendants argue that "[l]ong hair can lead to increased plumbing problems by making clogged drains more frequent." J.A. at 91 (Wingard Aff., ¶ 27). Even if we were to assume this to be true as a general matter, there is no evidence in the record that any clogged drains were ever attributed to Flagner's beard or sidelocks.

Based on the defendants' asserted justifications, followed by Flagner's demonstration of the lack of a factual basis for those justifications as applied to himself, the first *Turner* factor weighs heavily in favor of Flagner. The defendants have not had any security problems with Flagner, nor have they spent additional resources to provide extra security to perform searches of his beard and sidelocks. The defendants have multiple sketches of Flagner for ready distribution if he ever escaped. Finally, nothing in the record suggests that Flagner's beard and sidelocks have ever clogged the sinks or showers of the prison.

2. *Turner* Factors Two, Three, and Four.

Looking to the second *Turner* factor, there are no alternatives that remain open to Flagner in the exercise of his religion should the grooming regulation be upheld. None of the other aspects of Flagner's religion could ever compensate for the fact that an essential tenet of his religious beliefs prevents him from cutting his beard or sidelocks, and that enforcement of the grooming regulation would require the plaintiff to violate this very tenet.

As to the third *Turner* factor, the evidence in the record shows that no prison resources were ever diverted to accommodate the plaintiff and the then-exempted Native American inmates. J.A. at 294 (Wingard Dep.). The defendants also admitted that no extra guards were ever hired or overtime authorized to respond to additional security risks by Flagner and the other then-exempted inmates. J.A. at 260, 298 (Wingard Dep.). There is also no evidence in the record that other inmates resented Flagner because he was allowed at one time to grow out his beard and sidelocks.

The lack of an undue impact "on guards and other inmates, and on the allocation of prison resources generally," *Turner*, 482 U.S. at 90, also speaks to the final factor which is that having Flagner search his own beard is an "alternative that fully accommodates the plaintiff at *de minimis* cost to valid penological interests." *Id.* at 91. The defendants have already admitted that the accommodation of Flagner and the four Native American inmates did not cause the institution any financial hardship. J.A. at 294 (Wingard Dep.).

On balance, the second, third, and fourth *Turner* factors also weigh heavily in favor of Flagner because they demonstrate a lack of viable alternatives for Flagner to exercise his religion should the regulation be upheld, as well

as the absence of an undue negative impact on the prison community and its resources. Thus, looking at the totality of all four *Turner* factors, Flagner has presented sufficient evidence which raises serious questions concerning the validity of the defendants' asserted penological interests. As we noted earlier, courts generally defer to the expertise of prison officials "in the adoption and execution of polices and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Wolfish*, 441 U.S. at 547. In *Brown v. Johnson*, we concluded that "[a]s long as prison authorities present evidence to support their judgment that prison security will be undermined in the absence of a challenged regulation, we will not substitute our judgment for theirs." *Brown v. Johnson*, 743 F.2d 408, 412-13 (6th Cir. 1984), *cert. denied sub nom. Inosencio v. Johnson*, 469 U.S. 1215 (1985). However, we afford no deference to the policies and judgments of prison officials if there is "substantial evidence in the record to indicate that the officials have exaggerated their response." *Pell*, 417 U.S. at 827.

Consistent with these principles, in *Whitney v. Brown* we held that a prison policy which prohibited the intercomplex travel of six Jewish inmates for Sabbath services and annual Passover Seders was "an exaggerated response to speculative security objectives, and, therefore it [wa]s invalid." *Whitney*, 882 F.2d at 1078. In *Whitney*, we rejected a conclusory approach where "anything prison officials can justify is valid because they have somehow justified it." *Id.* at 1074. Like the defendants in *Whitney*, the defendants here have articulated a list of generalized concerns regarding the impact of exempting Flagner from the grooming regulation. Flagner, however, has demonstrated the absence of a factual basis for these penological concerns and has thereby called into question the credibility of those assertions. Resolution of these credibility issues can be best

achieved by the trial judge during further proceedings regarding Flagner's as-applied challenge to the grooming regulation.

Flagner is the only Orthodox Jew at MaCI, which has a population exceeding 2,500 inmates, who is requesting an exemption from the Ohio prison grooming regulation based on religious reasons. J.A. at 274-75 (Wingard Dep.). The fact that the defendants managed to wait five years before forcibly cutting Flagner's beard and sidelocks from June 1991 to July 1996 only further suggests that the defendants may be exaggerating their response to the potential security threats posed by permitting Flagner to grow his beard and sidelocks in a manner that is consistent with his religious beliefs.

Our reversal of the district court's denial of summary judgment based on qualified immunity does not preclude Flagner's as-applied challenge to the Ohio prison grooming regulation from proceeding. Accordingly, we **REMAND** to the district court for further consideration of Flagner's claims for declaratory and injunctive relief.

IV. CONCLUSION

Based upon the foregoing, the district court's order denying the defendants' motion for summary judgment based on qualified immunity is **REVERSED** insofar as Flagner seeks damages. Flagner may, however, continue with his action seeking declaratory and injunctive relief against the application of the Ohio prison grooming regulation, having presented a genuine issue of material fact regarding the validity of the defendants' penological justifications for the regulation. We therefore **REMAND** to the district court to allow Flagner's as-applied challenge seeking declaratory and injunctive relief to proceed.

CONCURING IN PART, DISSENTING IN PART

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. I concur in the conclusion that the qualified immunity doctrine bars plaintiff Flagner from attempting to mulct the defendants in damages for requiring him to comply with Ohio's prison regulation regarding facial hair. But because I believe that the defendants are entitled to prevail at the first stage of the qualified immunity analysis – *i.e.*, because I believe that the application of the regulation to Mr. Flagner is permissible under the Constitution as a matter of law – I would not let the claims for declaratory and injunctive relief go forward.

The district court's first-stage rationale was as follows:

> "[M]aterial issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. * * * Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns."

My colleagues on the panel agree with this rationale. I respectfully disagree. I am aware of no basis on which the regulation could properly be held invalid on its face, and it seems to me that the very existence of the regulation justifies its enforcement against Mr. Flagner.

Even under the restrictive statutory standard rejected by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the constitutionality of regulations such as

Ohio's was routinely upheld. See, for example, *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996), and *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). Post-*Boerne* decisions, of course, have reached the same result. See, *e.g.*, *Green v. Polunsky*, 229 F.3d 486 (5th Cir. 2000), and *Kimbrough v. California*, No. 00-15075, 2001 U.S. App. LEXIS 1864 (9th Cir. 2001). Within this circuit, Ohio's prison hair regulation has repeatedly been upheld against challenges under the Free Exercise Clause of the First Amendment. See *Williams v. Wilkinson*, No. 96-3715, 1997 U.S. App. LEXIS 36760 (6th Cir. 1997); *Brown v. Wilkerson*, No. 94-4014 (6th Cir. 1995); *Pollock v. Marshall*, 845 F.2d 656 (6th Cir. 1988). See also *Mays v. Wilkinson*, No. 98-3341, 1999 U.S. App. LEXIS 8380 (6th Cir. 1999) (unpublished order) (affirming dismissal for failure to state a claim where Ohio hair regulation was challenged under constitutional provisions other than the Free Exercise Clause).

I do not read *Turner v. Safley*, 482 U.S. 78 (1987), as suggesting that an "as applied" approach can routinely be used to circumvent a well-established body of law such as that upholding the Ohio regulation. Speaking through Justice O'Connor, the *Turner* Court noted that "[r]unning a prison is an inordinately difficult undertaking that requires expertise . . . peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. Moreover, the Court continued, "[p]rison administration is . . . a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* at 85. Against this background, and after an analysis of the facial validity of challenged Missouri prison regulations under the four "factors" discussed in the majority opinion here, the *Turner* Court upheld the validity of the first of the regulations (a prohibition against correspondence between inmates at different state prisons) on

the ground that, as a matter of law, it was "reasonably related to legitimate security interests." *Id.* at 91. The same sort of categorical analysis led the *Turner* Court to invalidate the other challenged regulation, a ban on inmate marriages.

The *Turner* opinion does not imply that an inmate who seeks to challenge a prison regulation the constitutionality of which has already been established is entitled to have the regulation subjected to fresh scrutiny under a four-factor analysis tailored to the plaintiff's individual circumstances. In a published opinion by which I should have thought this panel bound, our circuit has flatly rejected the idea that prisoners are entitled to this sort of individual fitting:

> "By creating the *Turner* test, the Supreme Court surely did not intend to provide a mechanism through which prisoners could mount repeated challenges to prison regulations and require courts to analyze, in detail, the impact such regulations would have in any particular factual setting, even if prior court precedent would seem to dictate the validity of the regulations. On the contrary: the Supreme Court's creation of the *Turner* standard was motivated by a desire to 'ensure[] the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, and avoid[] unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree.' *O'Lone*, 482 U.S. at 349 (quotation marks omitted). Penal authorities may need a clear rule for dealing with certain continuing or recurring situations, even when that rule could be better-tailored to the rights of individual prisoners through a court's flexible, case-by-case analysis."

Spies v. Voinovich, 173 F.3d 398, 403 - 04 (6th Cir. 1999).

It may be true, I suppose, that if Mr. Flagner were the only inmate in the Ohio prison system he could show that the hair regulation is not reasonably related to legitimate security interests peculiar to him. It may be true, in other words, that Mr. Flagner himself has never concealed contraband in his beard or sidelocks; that prison officials could easily and safely assure themselves of Mr. Flagner's continuing good behavior by having him run his own fingers through his hair; that no security problems of any kind have ever been associated with Mr. Flagner's facial hair; that his beard and sidelocks have never been mistaken for a "gang identifier;" that he has never attempted to escape from prison; that if he were to escape and shave off his facial hair in an effort to make himself harder to recognize, the effort would be unsuccessful because the authorities happen to have old photographs and sketches depicting him without such hair; and that Mr. Flagner's beard and sidelocks have never contributed to the clogging of drains in the prison's plumbing system. If all this were shown to be true, if we were writing on a clean slate, and if Mr. Flagner were Ohio's only prison inmate, I might well agree with my colleagues that the regulation should not be allowed to burden Mr. Flagner's right to put into practice his religious beliefs concerning facial hair.

But we are not writing on a clean slate, and Mr. Flagner, unfortunately, is not Ohio's only prison inmate. As of January 2001, according to an Ohio Department of Rehabilitation and Correction "Fact Sheet" available on the internet at www.drc.state.oh.us, Ohio's prison inmate population was 45,540. If three percent of the state's male prison population were to accept the majority opinion's

implied invitation to challenge the regulation on grounds comparable to those Mr. Flagner is being allowed to invoke here, the *Turner* factors would have to be separately weighed by the courts in something like 1,000 cases. And that is just in Ohio.

Such an outcome, in my view, would be undesirable. It would also be difficult to reconcile with the proposition – explicitly alluded to in *Turner* – that "judgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials . . . .'" 482 U.S. at 86 (quoting *Pell v. Procunier*, 417 U.S. 817, 827) (1974).

The conclusion that Mr. Flagner's claim is without legal merit finds support, I believe, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), a decision handed down three years after the decision in *Turner*. The question in *Smith* was whether the State of Oregon could deny unemployment benefits to people who had been fired from their jobs for ingesting a prohibited hallucinogen (peyote) in connection with sacramental activities at a Native American church. The Supreme Court answered in the affirmative, reasoning that where the state's object is not to prohibit or burden the exercise of religion, and any burden imposed by the state is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878.

Unlike *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) – a case where, as the *Smith* Court noted (494 U.S. at 884), a prison's refusal to excuse inmates from work to attend worship services was sustained without mention of a "balancing" test – *Smith* did not involve a prison regulation. Oregon's prohibition against the payment of benefits to

jobless users of illegal drugs was applicable to the citizenry of the state as a whole. And if the state's blanket prohibition against the payment of benefits to such people was sustainable notwithstanding its incidental effect on the religious practices of adherents of the Native American Church, it would seem to follow *a fortiori*, given the need for judicial restraint in the prison context, that a regulation such as the one at issue here should be sustainable notwithstanding the incidental burden it may place on the religious tenets of some prisoners.

The *Smith* Court was obviously content to follow a categorical approach in determining the constitutionality of the Oregon law. The Court seemed to take it for granted that because the law was constitutional as generally applied, the plaintiffs had no viable free exercise claim.[1] This reading is

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[1] It is true, as my colleagues on the panel point out in note 5 of the majority opinion, that a Federal Bureau of Prisons regulation banning the delivery to prisoners of periodical publications found "detrimental to institutional security" – a regulation held to be valid on its face – could be found invalid as applied to a particular publication. See *Thornburgh v. Abbott*, 490 U.S. 401 (1989). But I do not read *Thornburgh v. Abbott* as justifying a remand in the case at bar.

Here, as in *Turner v. Safley*, the plaintiffs would have been free, had this been a case of first impression, to attempt to show that the challenged regulation represented an "exaggerated response" to prison concerns, given the alleged existence of "obvious, easy alternatives . . . ." See *Turner*, 482 U.S. at 90. Had such a showing been made, a court could have considered it "as evidence that the regulation does not satisfy the reasonable relationship standard . . . ." *Id.* at 91. But our court has already held, in a Free Exercise Clause

strengthened by the latter part of the *Smith* opinion's penultimate paragraph, where the Court rejected the idea that a religious-practice exception to the general rule was mandated by the First Amendment:

> "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the

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context quite similar to the context in which the present appeal arises, that *Turner* cannot justify a remand for factfinding of the sort contemplated by my colleagues on the panel. See *Spies v. Voinovich*, 173 F.3d at 407. Such a remand, as *Spies* declared, "would be the type of 'unnecessary intrusion of the judiciary' into 'problems of prison administration' that *O'Lone* warned against." *Id.*

I can readily understand why my colleagues might wish that the judge who urged a remand in *Spies* had been writing the majority opinion rather than the dissent, just as I can readily understand why they might wish that the views of the Supreme Court justices who urged a remand in *O'Lone* had prevailed. But given the majority holdings in *Spies* and *O'Lone*, and given the post-*Abbott* holding in *Employment Division v. Smith*, I have greater difficulty understanding how it can be thought that we are free to order a remand here.

centrality of all religious beliefs." *Smith*, 494 U.S. at 890.

Insofar as my colleagues on the panel have concluded that the courts can and should discern appropriate occasions for waiving Ohio's prison hair regulation on a case-by-case basis, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-4145

HBRANDON LEE FLAGNER,
Plaintiff-Appellee,

v.

REGINALD WILKINSON, et al.,
Defendants-Appellants.

Filed: May 25, 2001

Before: NELSON and MOORE, Circuit Judges; WILHOIT, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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* The Honorable Henry R. Wilhoit, Jr., Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-96-887

HBRANDON LEE FLAGNER,
Plaintiff,

v.

REGINALD WILKINSON, et al.,
Defendant.

Filed: August 24, 1999

ORDER

[District Judge Susan J. Dlott]

On March 29, 1999, the Court adopted the Report and Recommendation of the Magistrate Judge denying both defendants' motion for summary judgment and plaintiff's partial cross-motion for summary judgment. (Doc. 49). On April 14, 1999, the Court granted defendants leave to file a second motion for summary judgment in this matter. This matter is before the Court on defendants' second motion for summary judgment on the basis of qualified immunity and a

recent decision from the Sixth Circuit (Doc. 54), and plaintiff's memorandum in opposition. (Doc. 55).[1]

Plaintiff is an inmate at the Madison Correctional Institution (MaCI) and former inmate at the Lebanon Correctional Institution (LeCI). He brings this action pursuant to 42 U.S.C. § 1983 challenging various practices of defendants which allegedly violate his First Amendment right to freely exercise his religious beliefs. Defendants are Reginald Wilkinson, director of the Ohio Department of Rehabilitation and Correction, the warden and various employees of the Lebanon Correctional Institution, and the warden of the Madison Correctional Institution. At issue in this case is defendants' enforcement of Ohio Administrative Code § 5120-9-25 (D) and (F), the grooming regulation which requires plaintiff to cut his beard and side locks shorter than permitted by the religious tenets of his Orthodox Hasidic Jewish faith. Plaintiff has alleged and, for purposes of their motion for summary judgment, defendants have accepted that a central tenet of plaintiff's religious faith prohibits the cutting of his side locks or shaving or cutting his beard. Defendants forcibly cut plaintiff's side locks and beard on July 29, 1996 and in April 1998.

In its Order denying defendants' first motion for summary judgment, the Court engaged in a lengthy analysis of defendants' decision to cut plaintiff's beard and side locks

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[1] The Court notes that the defense of qualified immunity protects officials from money damages, but not from injunctive or declaratory relief. *Collyer v. Darling*, 98 F.3d 211, 228 n.18 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997); *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992). Thus, plaintiff's claims for injunctive and declaratory relief are not subject to defendants' second motion for summary judgment based on qualified immunity.

under the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). The Court shall not repeat that analysis here, but shall incorporate by reference the facts and analysis set forth in the Report and Recommendation and Order adopting it. (Docs. 41, 49).

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party must demonstrate the absence of genuine disputes over facts which, under the substantive law governing the issue, could affect the outcome of the action. *Celotex Corp.*, 477 U.S. at 323.

Defendants contend that they are entitled to qualified immunity as a matter of law on plaintiff's First Amendment claim. Government officials, including prison officials, "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" *Black v. Parke*, 4 F.3d 442, 444 (6th Cir. 1993), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity insulates government officials from individual liability for money damages. *See, e.g., Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992).

A constitutional right is "clearly established," thereby precluding the application of qualified immunity, if "the law [is] clear in regard to the official's particular actions in the particular situation." *Black*, 4 F.3d at 445, quoting *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991). *See also Ward v. Dyke*, 58 F.3d 271, 273 (6th

Cir.), *cert. denied*, 516 U.S. 991 (1995); *Mackey v. Dyke*, 29 F.3d 1086, 1094 (6th Cir. 1994). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Black*, 4 F.3d at 445, quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The official, therefore, will be immune "if officers of reasonable competence could disagree" on whether his conduct violated the plaintiff's rights. *Caldwell v. Moore*, 968 F.2d 595, 599 (6th Cir. 1992), quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Once a defendant raises a qualified immunity defense, the plaintiff must satisfy a two prong analysis: (1) the allegations must state a claim for violation of clearly established law; and (2) the plaintiff must present evidence sufficient to create a genuine issue of material fact as to whether a defendant in fact committed the acts alleged. *Williams v. Pollard*, 44 F.3d 433, 434 (6th Cir. 1995), *cert. denied*, 516 U.S. 815 (1995); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994); *Russo v. Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992).

At the time of plaintiff's initial force haircut in 1996, the law was clearly established that prisoners retain the right to religious freedom and that prison officials may not deny inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Cruz v. Beto*, 405 U.S. 319, 322 (1972). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). The law relating to the Free Exercise Clause of the First Amendment in prisons permits infringement on a prisoner's free exercise of his religious beliefs only to the extent that such infringement is "reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349, quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). As discussed previously by the Court in its

Order denying defendants' first motion for summary judgment, this reasonableness inquiry is guided by the four *Turner* factors: whether there is a valid and rational connection between the regulation or restriction and the asserted governmental objective; whether plaintiff has alternative means of exercising his right of freedom of religion; the impact that accommodation of the asserted right will have on others, such as inmates and guards, in the prison; and the existence of ready alternatives to the regulation or restriction that fully accommodate plaintiff's rights. *Turner*, 482 U.S. at 89-91. *See Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988) (applying *Turner* analysis to an inmate's free exercise claim). *See also Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999).

Defendants contend that the Sixth Circuit and district courts have repeatedly upheld Ohio's grooming regulation in the face of inmate challenges based on the free exercise of religion. *See Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988) (Lakota American Indian); *Williams v. Wilkinson*, 96-3715 (6th Cir. Dec. 18, 1997) (unreported) (Rastafarian); *Syder v. Voinovich*, C2-94-0536 (S.D. E.D. Ohio March 31, 1998) (unreported) (Native Americans); *Davie v. Wingard*, 958 F. Supp. 1244 (S.D. Ohio, Eastern Div. 1997) (Nazarite); *Wellmaker v. Dahill*, 836 F. Supp. 1375 (N.D. Ohio 1993) (Nubian Islamic Hebrew). Defendants claim that in view of these cases, it was objectively reasonable for them to deny an exemption to plaintiff on the basis of his religion.

However, this Court has previously recognized that the cases cited by defendants are distinguishable from the instant case because the plaintiffs in those cases did not challenge the factual basis for the penological justifications asserted by prison officials. (Doc. 49 at 4). Here, plaintiff

presented extensive evidence attacking the validity of each penological interest advanced by defendants. (Doc. 49 at 4).

This case is more akin to *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), where the Court struck down a prison policy which eliminated the intercomplex travel of Jewish inmates to weekly Sabbath services and annual Passover Seders. The *Whitney* Court analyzed the policy and justifications therefor under *Turner* and *O'Lone* and found an absence of a factual underpinning relating to the justifications. 882 F.2d at 1073-77. Although *Whitney* did not address the issue of qualified immunity, it supports the position that *Turner* and *O'Lone* provide the "clearly established" law in this case: that the law requires some basis in actual fact for the justifications posed by prison officials, and not merely unsupported generalities.

As of the date of defendants' decision to enforce the grooming regulation against plaintiff, the law was clearly established, by decisions of the Supreme Court and Sixth Circuit, that prison officials could infringe upon plaintiff's First Amendment right to freely practice his religion only where such actions were "reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349; *Turner*, 482 U.S. at 89; *Whitney*, 882 F.2d at 1073-74. As discussed in the Report and Recommendation and the Court's Order adopting it, material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. (Doc. 41 at 8-13; Doc. 49 at 4-5). Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns. A reasonable prison official would have known in 1996 that he could not cut plaintiff's beard and side locks in contravention of plaintiff's sincerely held religious

beliefs in the absence of legitimate penological interests relating to the enforcement of the hair length regulation. Although the Court must accord deference to state officials in their administration of prison facilities, *Turner*, 482 U.S. at 85; *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), the Court cannot disregard an inmate's constitutional rights whenever prison officials articulate a possible, but unsubstantiated, security concern. Whether it was objectively reasonable for defendants to believe that their acts were lawful is an issue of fact. Accordingly, defendants are not entitled to the protection of qualified immunity.

Finally, defendants urge the Court to reconsider its previous decision on summary judgment in view of *Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999). In *Spies*, the Sixth Circuit upheld the lower court's dismissal of an inmate's claim that various prison regulations violated his free exercise rights. In evaluating the prisoner's claim under *Turner*, the Court of Appeals noted that "a trial court is not required to weigh evenly, or even consider explicitly, each of the four *Turner* factors." 173 F.3d at 403.

As previously discussed, this Court has already engaged in a lengthy *Turner* analysis and has explicitly considered each of the four *Turner* factors. The Court discerns no reason to revisit or eliminate any of its previous analysis just because an explicit discussion of each *Turner* factor was not required in the first instance. The Court therefore declines to reconsider its previous decision on summary judgment in light of the *Spies* decision.

Accordingly, defendants' second motion for summary judgment is **DENIED.**

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-96-887

HBRANDON LEE FLAGNER,
Plaintiff,

v.

REGINALD WILKINSON, et al.,
Defendant.

Filed: March 29, 1999

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

[District Judge Susan J. Dlott]

On February 3, 1999, the Honorable Magistrate Judge Sherman issued a Report and Recommendation (doc. #41) to deny both Defendant's Motion for Summary Judgment and Plaintiff's Partial Cross-Motion for Summary Judgment. Plaintiff and Defendant both filed Objections to the Magistrate Judge's Report and Recommendation (docs. #43 and #45, respectively). Upon consideration of the law and the facts, the Court hereby ADOPTS the well-reasoned Report and Recommendation of Magistrate Judge Sherman.

I. BACKGROUND

The Court will provide only a brief statement of relevant facts. A more thorough exposition can be found in the Report and Recommendation. Plaintiff Hbrandon Lee Flagner is an inmate at the Madison Correctional Institution ("MaCI") and former inmate at Lebanon Correctional Institute ("LeCI"). Defendants are Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Corrections, and officials from MaCI and LeCI. Flagner filed a Complaint alleging, in part, that Defendants' enforcement of Ohio Administrative Code § 5120-9-25(D) & (F) violates his rights under the Free Exercise Clause of the Constitution. The Code sections are Hair Length Regulations mandating that hair not grow more than three inches from the scalp and that beards do not exceed one-half inch in length.

Flagner alleges that as an Orthodox Hasidic Jew a central tenant of his faith prohibits the cutting of his sidelocks or the shaving or cutting his beard. He further alleges that the Hair Length Regulations require him to violate that central tenant. Defendants do not contest the sincerity of Flagner's belief. They argue, instead, that the Hair Length Regulations are valid because they are reasonably related to legitimate penological interests.

The parties filed Motions for Summary Judgment on the hair grooming claim. The Magistrate Judge determined that *Turner v. Safley*, 482 U.S. 78 (1987), was the controlling precedent and that factual issues precluded summary judgment to either party. Defendants object that the controlling precedent should be *Employment Division v. Smith*, 494 U.S. 872 (1990). Alternatively, Defendants argue that the Magistrate Judge misapplied the *Turner* factors and that, under a correct analysis of the *Turner* factors, Defendants are entitled to summary judgment as a matter of

law. Flagner argues that *Turner* is the controlling precedent and he is entitled to summary judgment as a matter of law.

II. LEGAL STANDARD AND ANALYSIS

The standard of review for a magistrate judge's decision regarding a pretrial matter depends upon whether the matter is dispositive. If the matter is "not dispositive of a claim or defense of a party," then the magistrate judge's decision is overturned only if it is "clearly erroneous or contrary to law." Fed. R. Civ. Pro. 72(a). If, however, the matter is dispositive, then the district judge must make a "de novo determination upon the record." Fed. R. Civ. Pro. 72(b). Motions for summary judgment are dispositive and, therefore, the Report and Recommendation will be reviewed de novo.

The Court must first determine whether *turner* or *Smith* is controlling. In *Turner*, the Supreme Court held that "when a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. In *Smith* the Court held that the Free Exercise Clause did not relieve an individual of the duty to comply with neutral, generally applicable laws that incidentally burden a religious practice. *See* 494 U.S. at 882-85.

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act ("RFRA"). The parties initial arguments on this claim were argued under the standards of the RFRA and on January 15, 1997 Magistrate Judge Sherman issued a Report and Recommendation (doc. #24) to grant Flagner's Motion for Injunctive Relief on the basis of the RFRA. Subsequent to the January 15, 1997 Report and Recommendation, the Supreme Court declared the RFRA to be unconstitutional. *See City of Boerne v.*

Flores, 117 S.Ct. 2157 (1997). The Honorable Judge Spiegel then issued an Order Reversing Magistrate Judge's Report and Recommendation (doc. #30) concerning the injunction. Judge Spiegel ruled that because the RFRA had been declared unconstitutional, *Smith* was again the controlling precedent. Order Reversing the Magistrate Judge's Report and Recommendation (doc. #30) p. 3. However, prior to receiving Judge Spiegel's Order, the parties did not brief the issue of whether *Turner* or *Smith* should be the controlling precedent in light of the RFRA being declared unconstitutional.

The parties have had the opportunity now to brief the Court on the issue of whether *Turner* or *Smith* is controlling. The Court agrees with the Magistrate Judge's well-reasoned conclusion that *Turner* is controlling. As the Magistrate judge determined, the Sixth Circuit has continued to apply the pre-RFRA standards set forth in *Turner* in prisoner cases challenging restrictions on the free exercise of religion. Report and Recommendation (doc. #41) p. 5. This Court will do the same.

Defendants' next argue that even under the four factor *Turner* standard, Defendants are entitled to summary judgment as a matter of law. The Court is cognizant of Sixth Circuit case law upholding the Hair Length Regulations on the basis of evidence similar to that the Defendants provide here. *See Williams v. Wilkinson*, No. 96-3715, 1997 WL 809971 (6th Cir. Dec. 18, 1997); *Pollack v. Marshall*, 845 F.2d 656 (6th Cir. 1988); *Davie v. Wingard*, 958 F. Supp. 1244 (S.D. Ohio 1244). The Court finds, however, that *Williams*, *Pollack*, and *Davie* are distinguishable because the plaintiffs in those cases provided little evidence contradicting the legitimate penological interests advanced by defendants.

In contrast, Flagner has provided extensive evidence attacking the validity of each legitimate penological interest Defendants advance in defense of the Hair Length Regulations. The Report and Recommendation thoroughly discussed the penological interests Defendants advance and Flagner's evidence in opposition. The Court need not repeat that analysis here. The Magistrate Judge concluded and the Court agrees that genuine issues of material fact remain in dispute.

Defendant argues that the Court should not view Flagner's situation in a vacuum, but rather within the context of the Ohio penal system. Flagner's evidence in opposition concentrates on the fact that the LeCI and MaCI did not have problems with security, sanitation, or staffing when exemptions from the Hair Length Regulations were granted temporarily to Flagner and four Native Americans. Evidence from a similar individualized inquiry was a sufficient basis to grant judgment for the plaintiffs in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989) (involving the right of Jewish inmates in Michigan to congregate for weekly Sabbath services and an annual Passover Seder). The Court concludes that it is best left for a jury to decide if the Hair Length Regulations are reasonably related to legitimate penological concerns.

III. CONCLUSION

For the reasons set forth above, the Magistrate Judge's Report and Recommendation is hereby ADOPTED.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-96-887

HBRANDON LEE FLAGNER,
Plaintiff,

v.

REGINALD WILKINSON, *et al.*,
Defendants.

Filed: February 3, 1999

REPORT AND RECOMMENDATION

(Spiegel, J.; Sherman, M.J.)

Plaintiff, an inmate at the Madison Correctional Institution (MaCI) and former inmate at the Lebanon Correctional Institution (LeCI), brings this action pursuant to 42 U.S.C. § 1983 challenging various practices of defendants which plaintiff alleges violate his religious beliefs in contravention of the Free Exercise Clause of the First Amendment.[1] Defendants are Reginald Wilkinson, director

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[1] Since the filing of the amended complaint, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, has been declared unconstitutional by the Supreme Court. *See City of Boerne v. Flores*, 117 S. Ct.

of the Ohio Department of Rehabilitation and Correction, the warden and various employees of the Lebanon Correctional Institution, and the warden of the Madison Correctional Institution. Plaintiff alleges that he is an Orthodox Hasidic Jew and that a central tenet of his faith prohibits the cutting of his sidelocks or shaving or cutting his beard. He challenges defendants' enforcement of Ohio Admin. Code § 5120-9-25 (D) and (F), the grooming regulation which requires plaintiff to cut his beard and sidelocks shorter than permitted by the religious tenets of his faith. He also alleges that defendants at LeCI denied him a proper kosher diet and that upon his transfer to MaCI he was assigned to certain kitchen duties which required him to handle or come into contact with pork products or products containing pork. He alleges that defendants' actions violate his rights as protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

This matter is before the Court upon defendants' motion for summary judgment (Doc. 34), plaintiff's cross-motion for partial summary judgment (Doc. 37), defendants' memorandum in opposition to plaintiff's cross-motion for partial summary judgment (Doc. 38), and plaintiff's reply memorandum in support of cross-motion for partial summary judgment. (Doc. 39). Defendants seek summary judgment on the grooming regulation issue only.[2]

2156 (1997). Therefore, plaintiff has no cause of action under RFRA.

[2] Although plaintiff's claims regarding his kitchen job at MaCI and his kosher diet at LeCI, where he resided prior to his transfer to MaCI, were not at issue for purposes of the motion for preliminary injunction previously filed by plaintiff (see Docs. 20, 24, 30), his claims for monetary damages are still viable.

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party must demonstrate the absence of genuine disputes over facts which, under the substantive law governing the issue, could affect the outcome of the action. *Celotex Corp.*, 477 U.S. at 323.

In response to a properly supported summary judgment motion, the non-moving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989). "[A]fter a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting [one's own] earlier deposition testimony." *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249-50. The trial court need not search the entire record for material issues of fact, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989), but must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted. *Street*, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead to a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

FACTS

Plaintiff, Hbrandon Lee Flagner, is an inmate at the Madison Correctional Institution (MaCI) in London, Ohio. Prior to his administrative transfer to MaCI, plaintiff resided at the Lebanon Correctional Institution (LeCI) from July 8, 1994 through November 20, 1996. Plaintiff resided at the Mansfield Correctional Institution prior to his transfer to LeCI.

At the hearing on plaintiff's motion for preliminary injunction in this matter, plaintiff testified that he began studying Orthodox Judaism in 1987. In June 1991, while an inmate at the Mansfield Correctional Institution, plaintiff formally converted to Orthodox Judaism. At that time he began growing his beard and sidelocks in accordance with his religious beliefs. Plaintiff has adhered to the requirements of Orthodox Jewish Law, maintaining a kosher diet and praying three times daily. (Doc. 20, Pl. Exhs. 2, 3; Doc. 37, Exhs. 2-4). Plaintiff testified that according to The Code of Jewish Law and the Torah, he is prohibited from cutting his sidelocks and beard and that it is his sincere belief that to do so constitutes a sin and disobedience to God's command not to cut his hair. (See also Doc. 37, Exhs. 3, 4). For purpose of the motion for summary judgment, defendants do not dispute the sincerity of plaintiff's beliefs concerning the prohibitions on cutting his sidelocks and beard.

Ohio Administrative Code regulations require inmates to maintain hair length at not more than three inches from the scalp. The regulations provides in pertinent part:

> Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. Hair and hairstyle[s] shall not protrude more than three inches from the scalp. Braids and plaits may be worn subject to the limitations of this rule. . . .

Ohio Admin. Code § 5120-9-25(D). The regulations also require inmates to neatly trim beards so that they do not exceed one-half inch in length. Ohio Admin. Code § 5120-9-25(F). The parties have agreed that defendants intend to require plaintiff to comply with the hair length regulations in the future. (Doc. 28 at 4; Doc. 34 at 4).

Plaintiff testified that he did not cut his sidelocks or beard while he was an inmate at the Mansfield Correctional Institution from June 1991 when he converted to Orthodox Judaism until July 8, 1994 when he was transferred to LeCI. Although plaintiff was threatened with disciplinary action by prison officials at the Mansfield Correctional Institution, he was never forced to cut his beard or sidelocks. Plaintiff also testified that officials at the Mansfield Correctional Institution required him to run his fingers through his beard on four occasions to search for contraband. He was never physically searched by prison officials in this regard.

Upon plaintiff's transfer to LeCi in July 1994, he was given numerous direct orders to cut his sidelocks and beard, but refused. Plaintiff was placed in disciplinary isolation on two occasions for his refusal. Plaintiff filed a grievance with

the Institutional Inspector at LeCi requesting an exemption from the forcible cutting of his sidelocks and beard. The grievance was denied on July 11, 1996. (Doc. 37, Exh. 1). On July 29, 1996, plaintiff was given a forced haircut by LeCI officials. Both his sidelocks and beard were cut to one-half inch. On August 2, 1996, subsequent to the forced haircut, plaintiff was photographed by prison officials. Plaintiff received no disciplinary conduct reports from LeCI officials subsequent to the forcible hair cutting, but was maintained in disciplinary isolation. Plaintiff testified that he was directed by LeCI corrections officers to run his fingers through his beard to search for contraband on only two occasions. He testified that the search of his beard took two to three seconds.

On November 20, 1996, plaintiff was transferred to MaCI. He was given numerous direct orders to cut his beard and sidelocks, but such orders were set aside pending the Court's ruling on plaintiff's motion for preliminary injunction. On August 8, 1997, plaintiff's motion for preliminary injunction was denied. (Doc. 30). Plaintiff was permitted to maintain his sidelocks and beard until April of 1998 at which time he was required to cut them to comply with the challenged regulations. (Wingard Depo. at 18).

The facts relating to the security concerns raised by defendants will be discussed below.

Applicable Standard of Review

Defendants contend that the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which formulated a "generally applicable regulation" test, provides the controlling law in this case. Plaintiff contends that the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), which requires that a prison official's actions be "reasonably related to legitimate penological interests," applies instead.

In *Smith*, the Supreme Court upheld the enforcement of a law of neutral and general applicability in a free exercise of religion case even in the absence of a compelling state interest. The Court held that the First Amendment's Free Exercise Clause did not relieve an individual of the duty to comply with neutral, generally applicable laws that incidentally burden a religious practice. 494 U.S. at 882-85. The Religious Freedom Restoration Act was passed by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, which "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress restored the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) for free exercise of religion claims. 42 U.S.C. § 2000bb(b)(1).

The Religious Freedom Restoration Act was later declared unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Subsequent to the *Boerne* decision, the courts in this circuit have consistently applied the pre-RFRA standard set forth in *Tuner v. Safley* in prisoner cases challenging restrictions on the free exercise of religion. *See, e.g., Looker v. State of Ohio*, 1998 W.L. 808369 (6th Cir. Nov. 9, 1998) (unpublished); *Boswell v.*

McGinnis, 142 F.3d 432 (6th Cir. 1998) (unpublished), 1998 W.L. 69303; *Brown v. Lewis*, 142 F.3d 432 (6th Cir. 1998) (unpublished), 1998 W.L. 68961; *Williams v. Wilkinson*, 134 F.3d 373 (6th Cir. 1997) (unpublished), 1997 W.L. 809971; *Elohim v. Williams*, 125 F.3d 855 (6th Cir. 1997) (unpublished), 1997 W.L. 589262; *Hasenmeier-McCarthy v. Rose*, 986 F. Supp. 464 (S.D. Ohio 1998) (Sargus, J.); *Abdullah v. Fard*, 974 F. Supp. 1112 (N.D. Ohio 1997). This Court has found no Sixth Circuit case or any district court case in the Sixth Circuit applying the *Smith* standard as defendants urge. *C.f. Shaffer v. Safle*, 148 F.3d 1180 (10th Cir. 1998) (applying *Smith* test in § 1983 prisoner action). Thus, this Court will apply the *Turner* standard in the instant case.

Application of *Turner v. Safley* to the Present Case

Although prison inmates retain the right to religious freedom, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Cruz v. Beto*, 405 U.S. 319 (1972), this right is subject to reasonable restrictions and limitations. *See Cruz*, 405 U.S. at 322; *Bell v. Wolfish*, 441 U.S. 520, 549-51 (1979). An inmate who challenges the actions of prison officials which infringe upon his religious practices or beliefs must first show that the particular practice or belief "is religious in the [inmate's] own scheme of things" and "sincerely held." *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987). Where the prison policy or action does not affect "an essential tenet" of the inmate's religious beliefs, no First Amendment violation will be found. *Abdur-Rahman v. Michigan Department of Corrections*, 65 F.3d 489, 491 (6th Cir. 1995). *See also Abdullah v. Fard*, 974 F. Supp. 1112 (N.D. Ohio 1997). As indicated above, defendants do not dispute the sincerity of plaintiff's religious beliefs that his Jewish faith prohibits him from shaving or cutting his sidelocks and beard for purposes of the motion for summary judgment.

In determining whether the actions of defendants in this case violate plaintiff's First Amendment rights, the Court must examine whether defendants' actions are reasonably related to legitimate penological interests. *O'Lone*, 482 U.S. at 349; *Turner*, 482 U.S. at 89. The Court's reasonableness inquiry is guided by several factors: whether there is a valid and rational connection between the regulation or restriction and the asserted governmental objective; whether plaintiff has alternative means of exercising his right of freedom of religion; the impact that accommodation of the asserted right will have on others, such as inmates and guards, in the prison; and the existence of ready alternatives to the regulation or restriction that fully accommodate plaintiff's rights. *Turner*, 482 U.S. at 89-91. *See also Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988) (applying *Turner* analysis to an inmate's free exercise claim). "Because the *Turner* factors were developed in the context of facial constitutional challenges, they may or may not lend themselves to an 'as applied' analysis, depending on the facts and circumstances of any given case." *Lyon v. Grossheim*, 803 F. Supp. 1538, 1552 (S.D. Iowa 1992). The *Turner* factors are guidelines to be weighed and balanced in evaluating the reasonableness inquiry, rather than four prongs of a test which must each be satisfied. *Whitney v. Brown*, 882 F.2d 1068, 1076 (6th Cir. 1989); *Munir v. Scott*, 907 F.2d 151 (6th Cir. 1990) (unpublished), 1990 W.L. 92680. Hence, the Court should address those factors which are most helpful and applicable to the given case. *See Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 103 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1682 (1992).

First *Turner* Factor: Is there a valid, rational connection between the application of the grooming regulation to plaintiff and the asserted penological interest?

As an initial matter, the Court recognizes that it must accord prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 103 (6th Cir. 1991); *cert. denied*, 112 S. Ct. 1682 (1992). The protection of internal prison security is "central to all other corrections goals." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). "[J]udgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Turner*, 482 U.S. 78, 86, quoting *Pell*, 417 U.S. at 827.

The Sixth Circuit's application of the *Turner* factors in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), is instructive in this case. In *Whitney*, the Sixth Circuit examined a prison policy which eliminated the intercomplex travel of Jewish inmates to weekly Sabbath services and annual Passover Seders. The Court held that such prohibitions impermissibly infringed on the free exercise rights of the Jewish inmates. The Court examined several justifications presented by prison officials for the ban on intercomplex travel. Such travel allegedly increased the movement between the complex and made Jewish inmates vulnerable to attack by other prisoners. However, the Court found that the factual record failed to support the general claim that Jewish inmates were any more vulnerable to attack than other inmates. Officials also claimed that intercomplex travel enhanced the risk of escape and the risk of contraband smuggling. Yet, the Sixth Circuit found that prison officials failed to present evidence of specific incidents of misconduct

connecting the intercomplex travel by the six Jewish inmates in question and the potential for escape or the smuggling of contraband. 882 F.2d at 1075. Officials also argued that allowing the Jewish prisoners to travel between complexes would impose additional burdens on the guards who would have to search them, as well as additional paperwork. 882 F.2d at 1070-75, 1077. While logically plausible, the Court found these concerns to be exaggerated in light of the facts and evidence presented that six inmates would not pose any real additional security problems given the already busy traffic flow in the prison on Saturdays. We note that the Court repeatedly cited the fact that only six Jewish inmates were involved in the ban in question, out of a total inmate population in excess of 4,500. *Id.* at 1073, 1074, 1075, 1077.

In evaluating the arguments of prison officials, the Sixth Circuit rejected the conclusory justifications posited by prison officials and what the Court viewed as the officials' misreading "of *Turner* and *O'Lone* as holding that federal courts will uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points. They seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it." *Id.* at 1974. *Whitney* teaches that there must be some basis in actual fact for the justifications posed by prison officials, and not merely unsupported generalities. The Sixth Circuit looked to the specific circumstances of the six Jewish inmates involved, indicating that the claimed justifications must be specific to the practice at issue. The *Whitney* Court also found significant the centrality of the belief at issue and the attempted accommodations by prison officials. With respect to the policy banning congregate Passover Seders, the Court noted that the Passover "is an especially critical and very special time in the jewish religion" and the prison policy at issue

"forecloses the only means by which the Jewish inmates may exercise their asserted right to mark Passover." *Id.* at 1073.

In the instant case, defendants assert that the hair length regulation furthers valid penological interests in maintaining institutional security and conserving prison resources. Defendants present the affidavit of defendant Curtis Wingard, the warden of the Madison Correctional Institution. Defendant Wingard states that contraband such as drugs and weapons is a serious problem in Ohio's prisons. He states, "Long hair and thick, full beards and sideburns provide good hiding places for such contraband as drugs and weapons." (Doc. 26, Wingard Aff. ¶ 4). Defendant Wingard states that he has personally found "tobacco, marijuana, and a razor blade hidden in inmates' hair." *Id.* However, when questioned by counsel for plaintiff at his deposition, defendant Wingard admitted he could give no "specific examples" of security problems concerning plaintiff's beard and sidelocks. (Wingard Depo. at 19-20).[3] Nor were any additional security precautions taken with plaintiff during the time period prior to April 1998 when plaintiff's beard and sidelocks were cut. (Wingard Depo. at 20). Plaintiff was the only Orthodox Jew at Madison Correctional Institution, out of an inmate population of over 2500, requesting an exemption from the grooming regulation for religious reasons. (Wingard Depo. at 34-35). Plaintiff testified at the hearing on preliminary injunction that he was permitted to maintain his sidelocks and beard in accordance with his religious beliefs for more than five years prior to the first forcible cutting of his beard and sidelocks. Additionally, during the period prior to April 1998 when plaintiff's beliefs were accommodated, an exemption from the grooming regulation was also granted to four Native Americans.

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[3] The length of the hair on plaintiff's head is not at issue in this case.

(Wingard Depo. at 35). Wingard testified that he knew of no specific incidents of contraband hidden in a Native American inmate's hair during this time period. (Wingard Depo. at 15). The evidence presented by plaintiff places into question whether the extent of defendants' concern about hidden contraband in the beard and sidelocks of plaintiff is justified. Thus, issues of fact exist as to whether accommodations of plaintiff's beliefs caused any specific security problems justifying the restriction on his religious beliefs.

Defendant Wingard also asserts that the hair length regulation further a legitimate security interest by freeing staff members "from the increased demands on their time that would otherwise result from the more frequent, wide ranging and lengthier searches that would be necessary to attempt to control contraband." (Doc. 26, Wingard Aff. ¶6). Yet, at his deposition, Wingard conceded that no additional staff or overtime has been expended to provide security for inmates who have been exempt from the grooming regulation. (Wingard Depo. at 60). Plaintiff testified at the preliminary injunction hearing that no guard ever personally searched his beard or sidelocks, but rather plaintiff was required to run his fingers through his beard and sidelocks on only a few occasions. Such searches of his beard took two to three seconds. Under plaintiff's version, this is far less than the burden of six additional searches found *de minimis* in *Whitney*, 882 F.2d at 1074-78. Thus, the extent of the burden on staff time caused by accommodating plaintiff's religious beliefs is at issue.

Defendant Wingard also states that the increased contact between guards and prisoners resulting from these more intensive searches would increase the potential for violence between the two. (Doc. 26, Wingard Aff. ¶8). Plaintiff testified at the preliminary hearing that he was never physically touched or searched by a guard during the four

years he was exempt from the grooming regulation. The claim that accommodating plaintiff's religious beliefs will increase confrontations with guards is not supported by the record. Plaintiff's experience during the years he was exempt from the hair length regulation belies the concern raised by defendants *See Whitley*, 882 F.2d at 1076.

Defendants also argue that the hair length regulation aids in the detection and control of gang activity within Ohio's prisons and stems hygiene and sanitation problems. (Doc. 26, Wingard Aff. ¶¶15-22, 27-28). Defendant Wingard testified, however, that the wearing of sidelocks and an untrimmed beard are not gang identifiers (Wingard Depo. at 57) and that shaved heads and tattoos, which may indicate gang identification, are permitted within the institution. (Wingard Depo. at 38-44). Inmates with shaved heads or tattoos are simply monitored more closely by prison staff. (Wingard Depo. at 44). It appears incongruous to permit inmates to possess characteristics identified with gangs, such as tattoos and shaved heads, yet disallow an inmate with a sincerely held religious belief to maintain a beard and sidelocks, which have no known relationship to gang identification, for fear of gang activity. In addition, Wingard testified that he knew of no relationship between an inmate's length of hair and disease or medical problems. (Wingard Depo. at 53). While undoubtedly long hair could clog drains, there is no evidence that sidelocks and an untrimmed beard pose the same plumbing problems.

Defendants also assert that "[u]niform application of the Hair Length Regulations further the compelling interest in the security of Ohio's prisons by reinforcing staff authority and discipline over inmates, making the job of controlling the prisons easier." (Doc. 34 at 9; Doc. 26, Wingard Aff. ¶¶12-13). In other words, any deviation from the grooming regulation or any other regulation for that matter, according

to defendants, compromises prison security. Such a rule against differential treatment eviscerates the notion that prisoners retain religious rights. This type of sweeping justification offered by defendants, without any particular evidence showing the relationship to the exemption sought by plaintiff, rules out any accommodations and conflicts with the fourth *Turner* factor mandating the Court to consider alternatives in assessing a regulation's reasonableness. It resembles the conclusory approach rejected by the Sixth Circuit in *Whitney* that "anything prison officials can justify is valid because they have somehow justified it." 882 F.2d at 1074.

Defendants also argue that the grooming regulation is necessary to ensure prompt and accurate identification of escaped inmates. (Doc. 26, Wingard Aff. ¶¶ 23-24; Doc. 34, Hale Aff. ¶¶ 4-12). Undoubtedly the recapture of an escaped inmate is a legitimate penological interest. The Supreme Court in *Turner*, in evaluating the reasonableness of a prison regulation, examined the actual past experiences of prison officials as relevant evidence in this determination. *Turner*, 482 U.S. at 98. Plaintiff presents testimony from defendant Wingard that he was aware of only two escape attempts during his twelve year tenure with the department of corrections and that neither incident was adversely affected by the accuracy of prison photos. (Wingard Depo. at 36-37). Plaintiff also asserts that defendants have photos of plaintiff with his beard and sidelocks, as well as with his shorter facial hair. This evidence presents the Court with a genuine issue of fact regarding whether a disallowance of any exemptions to the grooming regulation for sincerely held religious beliefs as plaintiff's in this case is necessary to protect defendants' interest. Moreover, the five year delay in the forcible cutting of plaintiff's beard and sidelocks from June 1991, when he converted to Judaism, to July 1996, indicates that the enforcement of the grooming regulation against plaintiff may

be an exaggerated response to the security interest advanced by defendants. While the Court recognizes a connection between the hair length regulation and accurate identification of inmates, the readily available alternative of "before" and "after" photographs accommodates plaintiff's religious beliefs at a *de minimis* cost to the prison's penological interests. *Whitney*, 882 F.2d at 1073, 1077.[4]

In view of the above, issues of fact preclude judgment as a matter of law on the first *Turner* factor for either party.

Second *Turner* Factor: does plaintiff have alternative means to exercise his religious beliefs?

The Court now considers the second *Turner* factor, whether alternative means exist for plaintiff to exercise his rights if defendants' refusal to grant him any exemption to the grooming regulation is upheld. Plaintiff testified at the preliminary injunction hearing and presented evidence showing that the Jewish prohibition against cutting his beard and sidelocks is absolute. (See Doc. 20, Pl. Exh. 4 at 1; see also Doc. 20, Pl. Exh. 4 at 2-3). Like the Jewish inmates in *Whitney v. Brown* who without weekly Sabbath services were

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[4] The Court is not unmindful that the same grooming regulation at issue here was upheld by the Sixth Circuit in *Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988), against a challenge by a Lakota American Indian who sought to enjoin prison officials from cutting his hair. *Pollock* is nevertheless distinguishable as the inmate in that case, unlike plaintiff here, failed to challenge the factual basis for the penological justifications asserted by prison officials. This case is more like *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), where there is an absence of a factual underpinning relating to the particular accommodation sought by plaintiff.

left with "nothing" in terms of a communal religious study, 882 F.2d at 1077, plaintiff here who is prevented from observing the commandment prohibiting the cutting of his beard and sidelocks is similarly left with nothing. The ability to exercise the other doctrines of his Orthodox Jewish faith, such as keeping kosher or wearing a yarmulke, in no way substitutes for or mitigates against the seriousness of violating the commandment not to shave one's beard or cut one's sidelocks. The other practices of his Jewish faith are in no way related to the tenet not to cut his beard or sidelocks and do not offer an alternative to keeping his beard and sidelocks in accordance with Orthodox Jewish law.

Third *Turner* Factor: what impact would accommodating plaintiff's religious beliefs have on others?

In terms of the third *Turner* factor, as discussed above, issues of fact exist as to whether exempting plaintiff from the grooming regulation based on his sincerely held religious beliefs would impose more than a minimal burden on prison staff and resources. Whether such an exemption would lead to more "intensive" searches by prison guards as defendants claim or a brief finger search lasting two or three seconds conducted by plaintiff himself is at issue. In addition, plaintiff's evidence showing no additional staff or financial resources were committed toward providing more security for plaintiff and the four other Native American inmates seeking an exemption indicates that defendants' proffered justification for denying an exemption to plaintiff is a debatable issue. Likewise, whether permitting an exemption to plaintiff would increase a perception of preferential treatment to plaintiff and negatively impact other inmates is at issue given the evidence of an absence of any actual security problems posed by the past exemption to plaintiff.

Fourth *Turner* Factor: are there ready alternatives to enforcing the grooming regulation against plaintiff that fully accommodate plaintiff's rights?

The evidence of readily available alternatives to defendants' security concerns indicates that defendants' denial of an exemption to the grooming regulation to plaintiff may be an exaggerated response to prison concerns. *Turner*, 482 U.S. at 90. As discussed above, plaintiff's evidence shows the procedures for searching his beard utilized in the past were minimally invasive and brief. Plaintiff simply ran his fingers through his beard. There is evidence that plaintiff is the only Orthodox Jewish inmate seeking an exemption to the grooming regulation. Moreover, defendants' concern with prompt identification of escaped inmates is mitigated by the existence of photographs of plaintiff with his beard and sidelocks as well as with shorter facial hair following the cutting of his beard in April 1998. Defendants dispute the efficacy of these alternatives. Thus, an issue of fact exists as to whether these readily available alternatives fully accommodate plaintiff's rights at a *de minimis* cost to defendants' security interests.

Summary judgment is not appropriate every time prison officials can articulate a possible but unsupported foundation for a contested regulation. *Whitney*, 882 F.2d at 1074. The Supreme Court in *Turner* and the Sixth Circuit in *Whitney* repeatedly looked to the underlying record for factual support of the articulated justifications for the regulations in question. Defendants have articulated generalized reasons supporting the grooming regulation. Plaintiff's elicitation of the absence of a factual basis for the asserted security concerns casts doubt on and calls into question the credibility of those assertions. These inconsistencies and contradictions in defendants' evidence

create a factual issue of credibility which cannot be resolved on summary judgment. Where the trial judge must assess the credibility of a witness, the case is particularly inappropriate for summary judgment and requires a hearing on the merits. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 909 (6th Cir. 1982). Therefore, defendants' motion for summary judgment and plaintiff's cross-motion for partial summary judgment should be denied.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendants' motion for summary judgment be denied.

2. Plaintiff's cross-motion for partial summary judgment be denied.

Date: 1/29/99

s/Jack Sherman, Jr.
Jack Sherman, Jr.
United States Magistrate Judge

ORIGINAL (5)

Supreme Court, U.S.
FILED
SEP 25 2001
CLERK

NO. 01-324

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD A. WILKINSON, ET AL. PETITIONERS

V.

HBRANDON LEE FLAGNER RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO PROCEED *IN FORMA PAUPERIS*

Respondent, by counsel, hereby moves pursuant to Rule 39 of the Rules of the Supreme Court of the United States for leave to proceed *In Forma Pauperis* in these proceedings.

In support of this Motion, Respondent states that on July 5, 1996, he tendered a *Pro Se* Complaint, as well as a *pro se* Motion for Leave to Proceed *In Forma Pauperis* pursuant to 28 U.S.C. § 1915. By Order rendered on August 26, 1996 the United States District Court for the Southern District of Ohio, Western Division granted Respondent's application pursuant to 28 U.S.C. § 1915(a).

At the time the action was filed, Respondent was an inmate at the Lebanon Correctional Institution. On November 23, 1996, he was transferred to the Madison Correctional Institution and is now located in the Ross Correctional

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facility in Chillicothe, Ohio. By *pro se* Motion filed on October 3, 1996 the Respondent sought appointment of counsel pursuant to 28 U.S.C. § 1915(d). The Motion for Appointment of Counsel was subsequently granted on October 22, 1996 and the undersigned was appointed counsel for the Respondent herein.

The Plaintiff is currently an inmate in the Ross Correctional Institution, and has no assets with which to oppose the Petitioner's Petition for Writ of Certiorari.

WHEREFORE, Respondent respectfully requests that he be granted leave to proceed *in forma pauperis* for purposes of submitting his Brief in Opposition, and for all subsequent proceedings before the Supreme Court for the United States of America.

Respectfully submitted,

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NO. 01-324

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD A. WILKINSON, ET AL. **PETITIONERS**

V.

HBRANDON LEE FLAGNER **RESPONDENT**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether *Turner v. Safley*, 482 U.S. 78, 89 (1987) allows the Respondent to pursue as-applied challenges to facially valid prison regulations, where inmate presents evidence refuting each of the penological justifications offered by prison officials to support denial of the inmate's First Amendment rights, and where the inmate has met his burden under *Turner*.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have accurately set forth the Constitutional, statutory and administrative provisions involved in their Petition.

COUNTER-STATEMENT OF THE CASE

Respondent, an Hasidic Jew, filed this action pursuant to 42 U.S.C. §1983 alleging that Petitioners application of its grooming regulation (Ohio Administrative Code Section 5120-9-25(F)) to require Respondent to remove his sidelocks and cut his beard violated his religious tenets and, thus, his rights as secured by the free exercise clause of the First Amendment to the United States Constitution.[1] The Sixth Circuit held that the individual Petitioners were entitled to qualified immunity but that, with respect to Respondent's request of declaratory and injunctive relief, there was a genuine dispute of material fact as to whether Respondent's First Amendment rights were violated.

Petitioners attempted below to justify their application of the grooming regulation to prevent Respondent from complying with his religious mandates by offering only the conclusory affidavit of Petitioner Wingard. Both the District Court and the Court of Appeals found that Respondent presented substantial

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[1] The length of Petitioner's hair on his head is not an issue in this case since his religious tenets permit him to keep his hair trimmed within the Regulation's limits of an inch and a half.

evidence in the record undercutting each of the penological justifications articulated by Petitioners. The Court held:

> While courts should generally defer to the expertise of prison officials in matters involving prison administration, this deference is only afforded "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response." *Wolfish*, 441 U.S. at 548. The plaintiff here, unlike the plaintiff in *Pollock* who did not challenge the factual underpinnings of the prison officials' justifications, has presented sufficient evidence to raise questions about the validity of the defendants' asserted penological interests.

Flagner v. Wilkinson, 241 F.3d 475, 483 (6th Cir. 2001). (App. 51a-15b). In so holding, the Court of Appeals properly followed this Court's precedent as established in *Bell v. Wolfish*, 441 U.S. 520, 548 (1979), *Pell v. Procunier*, 417 U.S. 817 (1974) and *Turner v. Safley*, 482 U.S. 78 (1987).

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION IS MANDATED BY THE SUPREME COURT'S DECISIONS IN *TURNER* AND *ABBOTT* AND DOES NOT CONFLICT WITH ANY OTHER CIRCUIT.

Petitioners incorrectly argue that the Sixth Circuit's decision in this action conflicts with holdings in other Circuits. Petitioners merely recite the holdings from decisions from other Circuits without any analysis of the applicable facts. Such an analysis reveals no conflict.

The Court of Appeals began with the premise mandated by this Court that

inmates retain rights to free exercise of religion and that prison officials may impinge on those constitutional rights "only if the regulation is reasonably related to legitimate penological interest." *Turner v. Safley*, 482 U.S. 78, 89 (1987). See *Flagner* at 483; Pet. App. p. 11a. Reasonableness is determined by applying *Turner's* four-factor test as the Court of Appeals did here. Those factors include the following: (1) whether there is a "valid rational connection" between the regulation and the legitimate governmental interest which it allegedly furthers; (2) whether there are alternative means by which the inmate may exercise the right impinged; (3) what impact the accommodation of the inmate's constitutional right will have on guards, other inmates, or the allocation of prison resources generally; and (4) the existence or absence of ready alternatives to the regulation in question. Each was considered in the manner required by this Court in *Turner* and followed in each of the Circuits cited by Petitioners. See *Flagner* at 484-487; Pet. App. 16a - 23a.

In applying these factors, the court reviewed the facts presented by Respondent, facts which the prisoner plaintiffs in each of the cases cited by Petitioners failed to produce. These facts include Warden Wingard's concession in deposition testimony that religious grooming exemptions previously permitted caused no security problems; that Respondent had been permitted to grow his

sidelocks and beard for several years without incident; that during these several years the exemptions caused no burdens on security staff (they had Plaintiff simply run his fingers through his own sidelocks and beard on only a few occasions); and that the appearance of an Hasidic Jew was not considered a "gang identifier." *Id.*

None of the inmate plaintiffs in the cases cited by Petitioners presented such strong evidence undercutting the penological justifications offered by prison officials. For example, in *Amatel v. Reno,* 156 F. 3d 192, 200-201 (D.C.Cir. 1998) the Court relied on "a significant body of research" to support the regulation proscribing pornography in prisons. The D.C. Circuit makes it quite clear that, in spite of its decision on the facial validity of the regulation, it may still be subject to constitutional attack in individual cases depending on the manner in which it is applied. "If the Bureau of Prisons applies the regulations in a manner that would violate the *Safley* principles, of course, that would be another case." *Id.* at 203. Accordingly, the principal the Petitioners would have this Court adopt is undercut by a case they rely upon.

The same analytical flaw exists with the other Circuit cases cited by Petitioners. In *Hines v. South Carolina Dept. of Corrections,* 148 F.3d 353 (4th Cir. 1998), the Court relied on the record developed by the State, which it notes

was not disputed by the inmates. *Id.* at 358. Likewise, in *Green v. Polunsky*, 229 F.3d 486 (5th Cir. 2000), the court dismissed the complaint as failing to state a claim. It appears that the inmate failed to allege facts sufficient to undercut the prison officials' asserted penological concerns. *Id.* at 491.

To Respondent's knowledge, no Circuit has held that, once a regulation has been found facially valid, its application can never be challenged as unconstitutional. Such would be inconsistent with *Turner's* mandate to consider the four factors set forth above. Indeed, without such an individual analysis it is not possible to determine whether an inmate's First Amendment needs can be accommodated "at **de minimis** cost to valid penological interests." *Turner* 482 U.S. at 91.

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

Petitioners argue unconvincingly that the decision in *Flagner* violates precedent established by this Court. To the contrary, the opinion of the Sixth Circuit is entirely consistent with this Court's prior holdings. In *Turner*, this Court defined the limits on a prison official's constitutional discretion to limit an inmate's right to exercise his religious beliefs, stating as follows:

> But ***if an inmate claimant*** can point to an alternative that

> fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90-91.

There can be no doubt from this discussion that *Turner* envisions trial courts addressing specific circumstances surrounding the religious needs of individual inmates. Indeed, it is impossible to consider "alternatives" promoted by "an inmate claimant," and to determine whether those alternatives may be accommodated "at *de minimis* costs" to the penological interests of the prison officials, without considering the facts surrounding the inmate's claim.

It is also clear that Petitioners' argument contravenes the Supreme Court's mandate in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), that trial courts must consider the manner in which prison regulations are applied as well as facial validity. This contradiction was appropriately noted by the Court of Appeals. "In *Thornburgh v. Abbott*, the Supreme Court considered both a facial and an as-applied challenge to a federal prison regulation concerning the receipt of subscription publications by inmates." *Flagner* at 484, n.5. Applying the *Turner* analysis, the *Abbott* Court concluded that the prison regulation at issue was facially valid; however, the Court remanded the case for further examination of the

plaintiffs' as-applied challenges concerning 46 publications introduced at trial. *Id.* at 404. Clearly, an individual inmate's "as-applied" challenge to regulations is consonant with this Court's precedent .

Additionally, the decision in *Flagner* applies this Court's holding in *Bell v. Wolfish,* 441 U.S. at 548, where the Court held that deference normally accorded prison officials is lost where the inmate presents "substantial evidence in the record to indicate that the officials have exaggerated their response." Applying this precedent, the Sixth Circuit found that:

> The plaintiff here, unlike the plaintiff in *Pollock* who did not challenge the factual underpinnings of the prison officials' justifications, has presented sufficient evidence to raise questions about the validity of the defendants' asserted penological interests.

Flagner at 483. The Respondent in this case, unlike any of the inmates in the other cases cited by Petitioners, ". . . presented sufficient evidence that prison officials' response to a supposed security concern was exaggerated." *Flagner*, 241 F.3d at 484, n. 5. See also *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), where the inmate, like Mr. Flagner, offered substantial evidence undercutting each of the penological concerns articulated by prison officials in its decision to deny the inmate plaintiffs in *Whitney* access to weekly Jewish Sabbath services. The constitutional principle advanced by Petitioners here would have prevented

Respondent here and the plaintiff in *Whitney* from offering evidence which disputed the articulated penological concerns.

None of the cases cited by Petitioners involved an inmate presenting proof sufficient to call into question the penological interests and concerns provided as justification for certain prison regulations. None have offered evidence similar to that submitted by Mr. Flagner here, suggesting that the prison officials' ***application*** of a regulation was an "exaggerated response" to a supposed security concern.

Contrary to Petitioners' assertion, the decision rendered by the Sixth Circuit in this case does not conflict with any prior authority of this Court. Indeed, the analysis and decision of the panel in this case is entirely consistent with and mandated by controlling authority previously announced by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89 (1987). Applying *Turner*, the Court of Appeals held:

> Thus, looking at the totality of all four *Turner* factors, Flagner has presented sufficient evidence which raises serious questions concerning the validity of the defendants' asserted penological interests.

Flagner at 487, Pet. App. P. 23a.

Petitioners contend that the Sixth Circuit's decision requires prison officials

to demonstrate something more than potential danger caused by exempting an inmate from a challenged prison regulation in a particular case. To the contrary, this Court will not find such a rule enunciated anywhere in the Sixth Circuit decision in this case. It must be emphasized, that the evidence upon which the inmate in this case relies, is evidence produced from the testimony and documents of Petitioners themselves. That evidence confirmed that the articulated penological concerns really had no application to the exemption sought by the Plaintiff. Applying the Court's holding in *Whitney*, the Panel concluded that,

> Like the Defendants in *Whitney*, the Defendants here have articulated a list of generalized concerns regarding the impact of exempting Flagner from the grooming regulation. Flagner, however, has demonstrated the absence of a factual basis for these penological concerns and thereby called into question the credibility of those assertions. Resolution of these credibility issues can best be achieved by the trial judge during further proceedings regarding Flagner's as-applied challenge to the grooming regulation.

Flagner, 241 F.3d at 487; Pet. App. 23a - 24a. The Panel merely followed this Court's mandate that deference normally afforded prison officials will not be available to "prison officials if there is `substantial evidence in the record to indicate that the officials have exaggerated their response.'" *Id.* quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

As it has been instructed to do by this Court, the court below considered Mr. Flagner's as-applied challenge to the grooming regulation and found that the evidence he submitted entitled him to a ruling on the merits. *See Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989). Moreover, Respondent has also offered an alternative means which would accommodate his religious beliefs "at de minimis cost to valid penological interests." *Turner*, 482 U.S. at 91; *See also, Pollock v. Marshall*, 854 F.2d 656 (1988), *cert. denied* 488 U.S. 897 (1988).

There simply is nothing in the decision of the Sixth Circuit that strays from any precedent established by this Court. The Petition should be accordingly denied.

III. THE SIXTH CIRCUIT DECISION WILL NOT PRODUCE ADDITIONAL IMPACT UPON PRISONS, JAILS AND COURTS.

Petitioners attempt to frighten the Court into reviewing this case by giving it a significance it does not deserve. The holding of the Sixth Circuit here is wholly dependent on the facts developed by the parties to this case. Since it follows established precedent and sets no new law, its precedential value is limited to the specific facts of this case and can create no burden that did not already exist with the holdings in *Turner, Pell* and *Abbott*. The lower court has not broken new legal ground and does not expand the rights of those incarcerated.

In *Turner*, this Court set the precedent under which an inmate plaintiff may proceed, and the Respondent is seeking nothing more than application of that precedent. The Petitioners' argument that the court system will be saturated with constitutional challenges and that prison officials will discontinue enforcement of penal regulations is completely without support. Their argument is pure hyperbole and insufficient to support the granting of a writ for certiorari.

CONCLUSION

Respondent has demonstrated that the Sixth Circuit properly applied this Court's precedent in granting qualified immunity to Defendants and in finding that there was a genuine dispute of material fact regarding the issue of whether the grooming regulation may be constitutionally applied to require Respondent to violate the tenets of his faith as an Hasidic Jew. Additionally, the Sixth Circuit did nothing more than recognize that all inmates retain certain First Amendment protections and that they are entitled to present evidence addressing the four *Turner* factors. Unlike the plaintiffs in cases relied upon by Petitioners, Respondent here actually developed a strong factual case refuting the penological justifications proffered by Petitioners. These facts clearly distinguish this case from those cited by Petitioners, thus leaving no conflict among the Circuits. The Petition, accordingly, should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX

A. Order of the United States District Court, Southern District of Ohio, Western Division dated September 6, 1996

B. Respondent's Motion for Appointment of Counsel

C. Order of the United States District Court, Southern District of Ohio, Western Division dated October 23, 1996

D. *Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Hbrandon Lee Flagner,
Plaintiff

vs

Reginald Wilkinson, et al.,
Defendants

Case No. C-1-96-887

ORDER

Plaintiff filed an application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) in connection with a civil suit brought under 42 U.S.C. § 1983. In accordance with section 804(a)(3) of the recently-enacted Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, amending 28 U.S.C. § 1915, plaintiff must pay an initial partial filing fee of 20 percent of the greater of the average monthly deposits to his prison account or the average monthly balance in his account for the six month period immediately preceding the filing of the complaint. After payment of the initial partial filing fee, plaintiff is further required to make monthly payments of 20 percent of the preceding month's income credited to his prison account until he pays the full amount of the filing fee. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, § 804(a)(3).

A prisoner may not be prohibited from bringing a civil action because he has no assets and no means to pay the initial filing fee. *Id.* If plaintiff does not currently possess the funds to pay the initial filing fee, the amount assessed by the Court will be collected from plaintiff's prison account when such funds become available.

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Plaintiff's affidavit reveals that he has insufficient funds in his prison account to pay the full filing fee. Plaintiff's application reveals that he currently possesses the sum of $21.69 in his prison account; his average monthly balance for the six month period prior to the filing of the complaint was $62.39; and his average monthly deposits for the six month period prior to the filing of the complaint amounted to $18.48.

After consideration by this Court of the plaintiff's affidavit of indigence only, without regard to the merits of this case, plaintiff's motion to proceed *in forma pauperis* is hereby GRANTED pursuant to 28 U.S.C. § 1915(a) as follows. Plaintiff is assessed an initial partial filing fee of $12.47 (20 percent of average monthly balance). The incarcerating institution is hereby ORDERED to forward from plaintiff's prison account to the Clerk of Court located in Columbus, Ohio the initial partial filing fee assessed against plaintiff, when funds are available in plaintiff's account, until such initial fee is paid. Thereafter, the incarcerating institution is ORDERED to forward to the Clerk of Court located in Columbus, Ohio monthly payments of 20 percent of plaintiff's preceding month's income credited to his prison account each time the amount in plaintiff's accounts exceeds $10.00 until the full amount of the filing fee is paid.

IT IS FURTHER ORDERED that the United States Marshal serve a copy of the complaint, summons, motion for preliminary injunction, and this order upon defendants. All costs of service shall be advanced by the United States.

It is further ORDERED that plaintiff shall serve upon defendants or, if appearance has been entered by counsel, upon defendants' attorney, a copy of every further pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed with the clerk of court a certificate stating the date that a true and correct copy of any document was mailed to defendants or defendants' counsel. Any paper received by a district judge or magistrate judge which has not been filed with the clerk or which fails to include a certificate of service shall be disregarded by the Court.

It is further ORDERED that plaintiff shall inform the Court

promptly of any changes of address which occur during the pendency of this lawsuit.

It is further ORDERED that defendants shall file a response to plaintiff's motion for preliminary injunction within twenty-one (21) days of the date they are served with the complaint and motion for preliminary injunction.

IT IS SO ORDERED.

Date: 8/29/96

kll

Jack Sherman, Jr.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HBRANDON LEE FLAGNER
PLAINTIFF

V

REGINALD WILKINSON, et. al.,
DEFENDANTS

CASE NO. C-1-96-887

MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. § 1915(d)

MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. §1915(d)

COMES NOW THE PLAINTIFF, HBRANDON LEE FLAGNER, PRO-SE, IN THE ABOVE-STYLED CIVIL ACTION RESPECTFULLY SUBMITTING HIS MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. §1915 (d) BEFORE THIS HONORABLE COURT. AN AFFIDAVIT IN SUPPORT IS ATTACHED AND MADE A PART HEREOF.

RESPECTFULLY SUBMITTED,

HBRANDON LEE FLAGNER
#188413
POST OFFICE BOX 56
LEBANON OHIO 45036

BEST AVAILABLE COPY

AFFIDAVIT IN SUPPORT

PLAINTIFF, HB2ANDON LEE FLAGNER, REQUEST THAT THIS COURT APPOINT COUNSEL FOR THE FOLLOWING VALID REASONS:

(1) PLAINTIFF STATES THAT DUE TO THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993, SECTION 42 U.S.C. § 2000 bb-1 HE HAS A LIKELIHOOD OF SUCCESS WITH HIS CLAIM SUBSEQUENT TO FILING HIS AMENDED COMPLAINT; AND THE FACT THE PLAINTIFF IS A VERIFIED ORTHODOX JEW;

(2) PLAINTIFF STATES THAT HE IS INDIGENT AND DEVOID OF FUNDS TO RETAIN PRIVATE COUNSEL;

(3) PLAINTIFF STATES THAT HE IS NOT WELLVERSED IN THE LAW NOR IN PROPER COURTROOM DECORUM;

(4) PLAINTIFF STATES THAT HE IS NOT IN THE POSITION TO INVESTIGATE THE CRUCIAL FACTS NEEDED TO ESTABLISH HIS CLAIMS, SEE SLAVIN V. CURRY 690 F.2d 446 (5TH CIR 1982) AND STRINGER V. ROWE, 616 F.2d 993 (7TH CIR 1980), WHETHER THERE ARE FACTS IN DISPUTE AND WHETHER THEY ARE COMPLICATED AND REQUIRE SUBSTANTIAL CROSS EXAMINATION, SEE LOPEZ V. REYES, 692 F.2d 15 (5TH CIR 1982), THE COMPLEXITY OF THE LEGAL ISSUES RAISED IN THE CASE AND WHETHER THE LAW IS UNCLEAR, SEE MERRITT V. FAULKNER, 697 F.2d 761 (7TH CIR 1983), AND WHETHER THE PLAINTIFF HAS THE CAPACITY TO PRESENT THE CASE HIMSELF SEE GORDON V. LEAKE, 574 F.2d 1147, 1153 (4TH CIR 1978) AND DRONE V. HUTTO, 565 F.2d 543 (8TH CIR 1977). PLAINTIFF FURTHER STATES THAT IT IS IMPERATIVE FOR THIS COURT TO SEE HOW THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA) WAS RULED IN OTHER COURTS. SEE HAMILTON V. SCHIRO, 863 F.SUPP 1019 (WD

MO 1994) (MO HAIR CUT RULES VIOLATED RFRA); WERNER V. MCCOTTER, 49 F.3d 1476 (10TH CIR 1995) (RFRA ANALYZED AND APPLIED IN 10TH CIRCUIT); LUCKETTE V. LEWIS, 883 F.SUPP 471 (D. AZ 1995) (RFRA TRO GRANTED); AND BELGARD V. STATE OF HAWAII, 883 F.SUPP 510 (D. HI 1995) (RFRA TRO GRANTED);

(5) PLAINTIFF STATES THAT REPRESENTATION BY COUNSEL OFTEN INCREASES THE LIKELIHOOD THAT THE CASE WILL BE HEARD AND DECIDED MORE QUICKLY;

(6) PLAINTIFF STATES THAT PRETRIAL DISCOVERY WILL USUALLY PROCEED MORE SMOOTHLY, THE PREPARATION OF BRIEFS WILL OFTEN BE MORE THOROUGH AND THE OPPORTUNITY FOR AN EFFECTIVE TRIAL WILL BE ENHANCED BY THE PRESENCE OF COUNSEL. ALSO, PRO-SE SUITS ARE OFTEN TAKEN LESS SERIOUSLY BY THE COURTS THAN LAWYER-ASSISTED CASES, AND THE CHANCES THAT A PRO-SE CASE WILL BE LOST AMONG THE VOLUMES OF PRO-SE CASES FILED EACH YEAR IS NOT REMOTE.

(7) PLAINTIFF STATES THAT HE SHOULD BE APPOINTED COUNSEL DUE TO THE ISSUE OF "QUALIFIED IMMUNITY" 'BECAUSE IT IS THE PLAINTIFF'S CONTENTION THAT THE DEFENDANTS, REGINALD WILKINSON, et.al., ARE **NOT** ENTITLED TO QUALIFIED IMMUNITY IN THEIR INDIVIDUAL AND/OR OFFICIAL CAPACITY 'BECAUSE THE DEFENDANTS ACTIONS OF FORCING THE PLAINTIFF TO HAVING HIS HAIR AND BEARD CUT PLUS DEPRIVING THE PLAINTIFF WITH ADEQUATE KOSHER MEALS NOT ONLY TOOK PLACE BEFORE PASSAGE OF THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993, BUT SUBSEQUENT TO PASSAGE OF THE RFRA AND THEY KNEW OR SHOULD HAVE KNOWN THEIR ACTIONS DID NOT COMPLY

WITH O'LONE V ESTATE OF SHABAZZ, 482 U.S. 342, 107 S.CT. 2400 (1987)

(8) PLAINTIFF STATES THAT HE SHOULD BE APPOINTED COUNSEL DUE TO THE FLAGRANT ABUSE OF HIS FIRST AMENDMENT RIGHTS (FREEDOM OF RELIGION) IN LIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 BY THE DEFENDANTS, REGINALD WILKINSON, et. al.,

IT IS SO PRAYED,

RE: CIVIL ACTION NO. C-1-96-88

STATE OF OHIO } SS:
COUNTY OF WARREN }

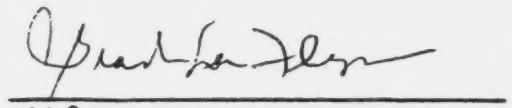
AFFIDAVIT

1. AFFIANT STATES THAT HIS NAME AND PRISON I.D. NUMBER IS: HBRANDON LEE FLAGNER, #188-413 AND THAT HE IS CURRENTLY INCARCERATED AT THE LEBANON CORRECTIONAL INSTITUTION LOCATED AT 3791 ST. RT. 63, P.O. BOX 56, LEBANON, OHIO 44036.
2. AFFIANT STATES HE IS THE PLAINTIFF IN CIVIL ACTION # NO. C-1-96-887 - FLAGNER V. WILKINSON, et. al.,
3. AFFIANT STATES THAT HIS MOTION FOR APPOINTMENT OF COUNSEL IS TRUE AND CORRECT AND SUBMITTED IN GOOD FAITH.

EXECUTED ON THIS 1ST DAY OF OCTOBER, 1996.

PURSUANT TO 28 U.S.C. § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. THIS CONCLUDES MY AFFIDAVIT IN SUPPORT.

RESPECTFULLY SUBMITTED



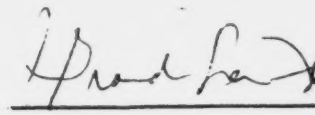
HBRANDON LEE FLAGNER
PRO-SE #188413
P.O. BOX 56
LEBANON, OHIO 45036

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT ON THIS 1st DAY OF OCTOBER, 1996, A TRUE COPY OF THIS MOTION FOR APPOINTMENT OF COUNSEL WAS SERVED UPON THE FOLLOWING COUNSEL OF RECORD FOR THE DEFENDANTS: OFFICE OF THE ATTORNEY GENERAL OF OHIO, 30 EAST BROAD STREET, COLUMBUS, OHIO 43266-0410

BY DEPOSITING SAME IN THE REGULAR UNITED STATES MAIL, POSTAGE PRE-PAID

RESPECTFULLY



HBRANDON LEE FLAGNER
PRO-SE #188413
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LEBANON, OHIO 45036

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Oct 23 11:3 AM '96

Judge 4&3D
Issue CMTC
Cert pkg
Docketed

Hbrandon Lee Flagner,
Plaintiff

vs

Case No. C-1-96-887

Reginald A. Wilkinson, et al.,
Defendants

ORDER

This matter is before the Court on plaintiff's motion for appointment of counsel (Doc. 9) and motion for preliminary injunction. (Doc. 4).

For good cause shown, plaintiff's motion for appointment of counsel is CONDITIONALLY GRANTED upon the Clerk of Court's ability to secure counsel for him. The Clerk is therefore ORDERED to make reasonable efforts in that regard.

Plaintiff's motion for preliminary injunction shall be set for a telephonic hearing on Monday, November 18, 1996 at 2:00 p.m.

IT IS SO ORDERED.

Date: 10/22/96
kll

Jack Sherman, Jr.
United States Magistrate Judge

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11

HBRANDON LEE FLAGNER, Plaintiff-Appellee, v. REGINALD WILKINSON, et al., Defendants-Appellants.

No. 99-4145

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

241 F.3d 475; 2001 U.S. App. LEXIS 2560; 2001 FED App. 0047P (6th Cir.)

October 16, 2000, Argued

February 22, 2001, Decided

February 22, 2001, Filed

SUBSEQUENT HISTORY:
[**1] Rehearing Denied May 25, 2001, Reported at: *2001 U.S. App. LEXIS 11609.*

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 96-00887. Susan J. Dlott, District Judge.

DISPOSITION:
REVERSED and REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff filed a pro se *42 U.S.C.S § 1983* action against defendants alleging that a prison grooming regulation violated his religious rights. Defendants moved for summary judgment on qualified immunity grounds. The United States District Court for the Southern District of Ohio at Cincinnati denied the motion, and defendants appealed.

OVERVIEW: Plaintiff, a practicing Orthodox Hasidic Jew, sought damages for defendants' forcible cutting of his beard and sidelocks, and declaratory and injunctive relief preventing defendants from cutting them in the future. At the time of the forced cutting, plaintiff's right to grow his beard and sidelocks in contravention of the grooming regulation was not sufficiently clear that a reasonable official would have understood that what he was doing violated that right. Thus, plaintiff could not show that defendants violated a clearly established constitutional right. Defendants, then, were entitled to qualified immunity on plaintiff's damages claim. However, reversal of the denial of summary judgment based on qualified immunity did not preclude plaintiff's as-applied challenge to the grooming regulation. Defendants articulated generalized penological concerns regarding the impact of exempting plaintiff from the grooming regulation. Plaintiff, in turn, showed an absence of a factual basis for those concerns and called their credibility into question. These issues were best resolved by a trial judge. Thus, plaintiffs' claims for declaratory and injunctive relief were remanded.

OUTCOME: The appeals court reversed the district court's denial of summary judgment to the defendants based on qualified immunity. However, this reversal did not preclude plaintiff's as-applied challenge to the prison grooming regulation. Accordingly, plaintiff's claims for declaratory and injunctive relief were remanded to the district court for further consideration.

CORE CONCEPTS

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
See Ohio Admin. Code § 5120-9-25(D) (2000).

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
See Ohio Admin. Code § 5120-9-25(F) (2000).

Civil Procedure : Appeals : Appellate Jurisdiction : Collateral Order Doctrine

A federal court of appeals has jurisdiction over an appeal from the district court's order denying summary judgment based on qualified immunity, which is an immediately appealable collateral order.

Civil Procedure : Appeals : Appellate Jurisdiction
Constitutional Law : Civil Rights Enforcement : Official Immunities
A defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial.

Civil Procedure : Appeals : Standards of Review : De Novo Review
The determination of whether qualified immunity applies to an official's actions is a legal determination that an appeals court reviews de novo.

Civil Procedure : Summary Judgment : Summary Judgment Standard
A motion for summary judgment will be granted if the evidence presented to the court demonstrates that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. An appeals court must not weigh the evidence, but rather it must only determine whether there is a factual dispute that precludes summary judgment.

Constitutional Law : Civil Rights Enforcement : Official Immunities
Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Constitutional Law : Civil Rights Enforcement : Official Immunities
Qualified immunity protects public officers from undue interference with their duties and from potentially disabling threats of liability.

Civil Procedure : Summary Judgment : Summary Judgment Standard
Constitutional Law : Civil Rights Enforcement : Official Immunities
Damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of qualified immunity.

Constitutional Law : Civil Rights Enforcement : Official Immunities
The first step in determining if the defendants are entitled to qualified immunity is to examine whether, based on the applicable law, a constitutional violation occurred. If a constitutional violation is found, the United State Court of Appeals for the Sixth Circuit next considers whether the violation involved clearly established constitutional rights of which a reasonable person would have known. To determine whether a constitutional right is "clearly established," the court looks first to the decisions of the United States Supreme Court, then to its own decisions and other courts within the Sixth Circuit, and finally to decisions of other circuits.

Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871
Constitutional Law : Civil Rights Enforcement : Official Immunities
Under the United States Court of Appeals for the Sixth Circuit's qualified immunity framework, to plead a proper claim under *42 U.S.C. § 1983*, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law, such that the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Constitutional Law : Civil Rights Enforcement : Official Immunities
After determining that a constitutional right is clearly established, the final step in the United States Court of Appeals for the Sixth Circuit's qualified immunity analysis is to inquire whether the plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Civil Procedure : Summary Judgment : Summary Judgment Standard
Constitutional Law : Civil Rights Enforcement : Official Immunities
Summary judgment is not appropriate on qualified immunity grounds if there is a genuine factual dispute relating to whether the defendants committed acts that allegedly violated clearly established rights.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.

Constitutional Law : Fundamental Freedoms : Freedom of Religion : Free Exercise of Religion

Inmates retain First Amendment, U.S. Const. amend. I, rights, including the right to free exercise of religion.

Constitutional Law : Fundamental Freedoms : Freedom of Religion : Free Exercise of Religion
A prisoner alleging that the actions of prison officials violate his religious beliefs must show that the belief or practice asserted is religious in the person's own scheme of things and is sincerely held.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
In most circumstances, prison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. To ensure that courts afford appropriate deference to prison officials, prison regulations alleged to infringe constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. The proper standard is as follows: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871
An inmate alleging a 42 U.S.C.S. § violation bears the burden to allege and prove that the defendant official violated a clearly established constitutional right.

Constitutional Law : Civil Rights Enforcement : Official Immunities
To deny qualified immunity protection to the defendants, the law requires that in the light of pre-existing law the unlawfulness of defendants' conduct must be apparent.

Constitutional Law : Civil Rights Enforcement : Official Immunities
The defense of qualified immunity protects officials from individual liability for money damages but not from declaratory or injunctive relief.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
In considering a challenge to a prison policy as applied, the proper inquiry is whether the actions of the prison officials are reasonably related to legitimate penological interests.

Constitutional Law : Fundamental Freedoms : Freedom of Religion : Free Exercise of Religion
Inmates retain rights to free exercise of religion. Prison officials may impinge on these constitutional rights only if the regulation is reasonably related to legitimate penological interests. While courts should generally defer to the expertise of prison officials in matters involving prison administration, this deference is only afforded in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
Courts employ a four-factor analysis to determine whether a prison regulation is reasonably related to legitimate penological interests. These factors are not necessarily weighed evenly, but rather they are guidelines for the court to assess whether the prison officials' actions are reasonably related to a valid penological basis. Under the first factor, the court must consider whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. A regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
Courts employ a four-factor analysis to determine whether a prison regulation is reasonably related to legitimate penological interests. The final three factors should be balanced together. The second factor to consider is whether there are alternative means of exercising the right that remain open to prison inmates. The third factor courts consider is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. When accommodation of an asserted right will have a significant ripple effect on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights
Courts employ a four-factor analysis to determine whether a prison regulation is reasonably related to legitimate penological interests. With respect to the fourth factor, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. Likewise, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns. This is not a least restrictive alternative test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. However, if an inmate claimant

can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Criminal Law & Procedure : Postconviction Proceedings : Imprisonment & Prisoner Rights

Courts generally defer to the expertise of prison officials in the adoption and execution of polices and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. As long as prison authorities present evidence to support their judgment that prison security will be undermined in the absence of a challenged regulation, a court will not substitute its own judgment for theirs. However, courts afford no deference to the policies and judgments of prison officials if there is substantial evidence in the record to indicate that the officials have exaggerated their response.

COUNSEL:

ARGUED: Todd R. - Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellants.

Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellee.

ON BRIEF: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellants.

Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellee.

JUDGES:

Before: NELSON and MOORE, Circuit Judges; WILHOIT, District Judge. * MOORE, J., delivered the opinion of the court, in which WILHOIT, D. J., joined. NELSON, J., delivered a separate opinion concurring in part and dissenting in part.

* The Honorable Henry R. Wilhoit, Jr., Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINIONBY:

KAREN NELSON MOORE

OPINION:

[*477]

KAREN NELSON MOORE, Circuit Judge. The plaintiff, Hbrandon Lee Flagner, filed a *42 U.S.C. § 1983* action alleging that an Ohio prison [**2] grooming regulation violated his constitutional right to practice his religion. The defendants ask this court to reverse the district court's order denying the defendants' summary judgment motion based on qualified immunity, arguing that Flagner has not alleged a constitutional violation and that the regulation has a valid penological basis. Based on our precedent in ***Pollock v. Marshall***, *845 F.2d 656, 659-60* (6th Cir.), **cert. denied**, *488 U.S. 897, 102 L. Ed. 2d 228, 109 S. Ct. 239 (1988)*, we **REVERSE** the district court's denial of the defendants' motion for summary judgment based on qualified immunity. We also conclude that Flagner may bring an as-applied challenge to the Ohio prison grooming regulation and that there is a factual dispute on the issue of whether the defendants have a valid penological interest. Accordingly, we **REMAND** to the district court so that Flagner's claims for declaratory and injunctive relief may proceed.

I. BACKGROUND

Flagner has been incarcerated with the Ohio Department of Rehabilitation and Correction (ODRC) since 1986. Flagner is a practicing Orthodox Hasidic Jew who brought a § 1983 [**3] suit against prison officials challenging the enforcement of Ohio Administrative Code § § 5120-9-25 (D) and (F), n1 a prison grooming regulation which [*478] requires Flagner to cut his beard and sidelocks, also referred to as "peos," in contravention of the tenets of his religious faith. n2 The defendants are ODRC employees who work at either the Lebanon Correctional Institution (LeCI) or the Madison Correctional Institution (MaCI). Flagner was imprisoned at LeCI from July 8, 1994 to November 20, 1996, and transferred shortly thereafter to MaCI. Prior to his transfer to LeCI, Flagner resided at the Mansfield Correctional Institution. He is currently incarcerated at Ross Correctional Institution.

n1 Ohio Administrative Code § 5120-9-25(D) provides the following:

Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. **Hair and hairstyle shall not protrude more than three inches from the scalp**. Braids and plaits may be worn subject to the limitations of this rule. The following hairstyles or facial hair are not permitted: Initials, symbols, dyes, multiple

parts, hair disproportionately longer in one area than another (excluding natural baldness), weaves, wigs, dreadlocks and shaved heads. Other hairstyles not specifically listed herein may be prohibited if they are determined to be either a threat to security or contrary to other legitimate penological concerns.

Ohio Admin. Code § 5120-9-25(D) (2000) (emphasis added). Subsection (F) provides, "sideburns, beards, and moustaches must be neatly trimmed. **Facial hair must not protrude more than one-half inch from the skin**." Ohio Admin. Code § 5120-9-25(F) (2000) (emphasis added). [**4]

n2 **The Code of Jewish Law**, Chapter 170, entitled "The Prohibition Against Shaving the Corners of One's Head and Beard" provides the following:

1. [Leviticus 19:27 states: "Do not cut off [the hairs of] the corners of your heads and do not destroy the corners of your beards." Our Sages explain tha there are two "corners of the head," the place at which the skull is attached to the jawbone, near the ear at both the right and left sides of the head. [Shaving the hair off the "corners" is forbidden.]

There are certain opinions that forbid cutting off the hair with scissors if it is done as effectively as if it were done with a razor -- **i.e.**, removing all the hair, even that which is closest to the flesh. Therefore, if one is required to remove one's hair for medical reasons, one should be careful not to remove the hair closest to the flesh.

The area that is forbidden to be shaved extends from the hair on one's temples to below the ear, the place from which the lower jaw protrudes.

2. The Torah forbade "destroying" the corners of the beard only with a razor. [Our Sages spoke of] five corners; [their definition, however, is a matter of question] and there are many opinions in this regard. Therefore, a God-fearing person should not pass a razor over his beard at all. [This includes] also his mustache and the hair below the chin.

There is no difference between a razor and a sharp stone that cuts hair, **e.g.**, pumice stone. When using a salve to remove one's beard -- **e.g.**, a mixture containing lime -- one should be careful not to scrape off the substance with a knife, lest one cut off some hair. Instead, one should scrape it off with a sliver of wood or the like.

Joint Appendix ("J.A.") at 140 (Pl.'s Ex. 4, Mem. from Aleph Inst. regarding Jewish Law) (emphasis added).

[**5]

In 1987, Flagner began studying Judaism and formally converted to Orthodox Judaism in 1991 while incarcerated at the Mansfield Correctional Institution. His religious affiliation has been recognized by the defendants and is not in dispute in this case. Flagner testified during the preliminary injunction evidentiary hearing held on December 3, 1996, that between 1991 when he converted to Judaism and prior to his transfer to LeCI in 1994, Mansfield prison officials did not make any effort forcibly to cut his beard or sidelocks. In fact, a period of five years passed between the time Flagner converted to Orthodox Judaism in 1991 until his first forced cutting in 1996.

On January 26, 1996, Flagner was given a direct order by Defendant Bobby Couch of LeCI, to comply with the grooming regulation, but Flagner refused, stating his religious tenets prevented compliance. On February 16, 1996, the Rule Infractions Board found Flagner guilty of disobeying the order and sentenced him to time in a disciplinary isolation unit. On June 21, 1996, Flagner received another direct order from Defendant Couch to comply with the grooming regulation. Flagner then filed a grievance on June 28, 1996, which [**6] was reviewed by Defendant David Gardner, Inspector of Institutional Services, on July 11, 1996. In his disposition, Defendant Gardner stated that Flagner was in violation of § 5120-9-25(D) and was required to comply with the regulation. Failure to comply would subject Flagner to "appropriate disciplinary action [*479] [] which may include requiring [Flagner's] hair to be cut or trimmed against [his] will." Joint Appendix ("J.A.") at 135 (Disposition of Grievance Form). Flagner continued to refuse to comply with the regulation. On July 29, 1996 and in April 1998, the defendants forcibly cut Flagner's beard and sidelocks. Between the time of Flagner's forced cuttings in July 1996 and April 1998, the defendants exempted him and four Native American inmates from the grooming regulation.

Defendant Curtis Wingard, the warden of MaCI testified in his deposition that exempting Flagner from the grooming regulation did not pose additional security problems at MaCI; no additional security precautions were taken with Flagner in excess of the security measures taken with inmates who complied with the

PUBLISHER'S NOTE:

Page(s) 6 missing in original.

explained that "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of [qualified] immunity." ***Butz v. Economou***, *438 U.S. 478, 508, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978)*.

As we explained in **Dickerson**, the first step in determining if the defendants are entitled to qualified immunity is to examine "whether, based on the applicable law, a constitutional violation occurred." ***Dickerson***, *101 F.3d at 1157*. If a constitutional violation is found, we next consider whether the violation involved "clearly established constitutional rights of which a reasonable person would have known." ***Id.*** *at 1158* (quoting ***Christophel v. Kukulinsky***, *61 F.3d 479, 484 (6th Cir. 1995)*). To determine whether a constitutional right is "clearly established," we "'look first to the decisions of the Supreme Court, then [**12] to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits.'" **Id.** (quoting ***Buckner v. Kilgore***, *36 F.3d 536, 539 (6th Cir. 1994)* (citation omitted)). Under this framework, to plead a proper claim under *42 U.S.C. § 1983*, "a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law," ***Russo v. City of Cincinnati***, *953 F.2d 1036, 1042 (6th Cir. 1992)*, such that "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." **Id.** (quoting ***Anderson v. Creighton***, *483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)*).

After determining that a constitutional right is clearly established, the final step in our qualified immunity analysis is to inquire "whether the plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what [the official] allegedly [*481] did was objectively unreasonable in light of [the] clearly established constitutional rights." ***Dickerson***, *101 F.3d at 1158* [**13] (quoting ***Adams v. Metiva***, *31 F.3d 375, 387 (6th Cir. 1994)*). "Summary judgment is not appropriate if there is a genuine factual dispute relating to whether the defendants committed acts that allegedly violated clearly established rights." **Id.**

Turning to the first prong of our qualified immunity analysis, we must ask whether a constitutional violation occurred. The Supreme Court has recognized that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." ***Bell v. Wolfish***, *441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979)*. Specifically, the Supreme Court has held that inmates retain First Amendment rights, **see** ***Pell v. Procunier***, *417 U.S. 817, 822, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974)*, including the right to free exercise of religion. **See** ***Cruz v. Beto***, *405 U.S. 319, 322 n.2, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972)* (concluding that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty"). A prisoner alleging [**14] that the actions of prison officials violate his religious beliefs must show that "the belief or practice asserted is religious in the person's own scheme of things" and is "sincerely held." ***Kent v. Johnson***, *821 F.2d 1220, 1224 (6th Cir. 1987)*

In this case, the sincerity of Flagner's religious beliefs is not in dispute. Flagner alleges that application of § § 5120-9-25(D) and (F) violated his First Amendment free exercise rights. He asserts that despite his efforts to prevent prison officials from violating the tenets of his religious faith, the defendants forcibly cut his beard and sidelocks in 1996 and 1998.

The Supreme Court has held that in most circumstances, prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." ***Wolfish***, *441 U.S. at 547*. "To ensure that courts afford appropriate deference to prison officials," the Supreme Court has "determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less [**15] restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." ***O'Lone v. Estate of Shabazz***, *482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987)*. In **Turner v. Safley**, the Supreme Court articulated the proper standard as follows: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." ***Turner v. Safley***, *482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*.

We agree with the district court's conclusion in its March 23, 1999 Order adopting the magistrate judge's Report and Recommendation that the proper standard to apply in prisoner cases challenging restrictions on the free exercise of religion is supplied by the Supreme Court's decision in **Turner**, not by ***Employment Division, Department of Human Resources of Oregon v. Smith***, *494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*. n4 In **Smith**, the Supreme Court concluded "that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified [**16] by a compelling governmental interest." ***Id.*** *at 886 n.3*. Following the **Smith** decision, Congress enacted the Religious Freedom Restoration Act (RFRA) which was later held unconstitutional by the Supreme Court in ***City of Boerne v. Flores***, *521 U.S. 507, 511, 138 L. Ed. 2d 624, 117 S.*

Ct. 2157 (1997). As the district court and magistrate judge correctly recognized, [*482] after the **Boerne** decision, our Circuit has consistently applied the pre-RFRA standard set forth in **Turner** to evaluate challenges by prisoners to restrictions on the free exercise of religion. **See, e.g.**, ***Spies v. Voinovich, 173 F.3d 398, 403 (6th Cir. 1999)*** (applying the **Turner** standard to evaluate First Amendment free exercise challenges to prison regulations).

n4 This Order dated March 23, 1999 was listed in the defendants' Notice of Appeal but was not included by the parties in the Joint Appendix.

As we explain in Part C, we believe that Flagner has presented sufficient evidence [**17] that application of the grooming regulation would violate his constitutional rights. We agree with the district court that "material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns." J.A. at 236 (D. Ct. Order of 8/24/99). Under the Supreme Court's decision in **Johnson** we would not be able to exercise appellate jurisdiction because the Court has held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." ***Johnson, 515 U.S. at 319-20.*** In this case, with respect to the first prong of the qualified immunity analysis, there are genuine issues of material fact as to whether a constitutional violation occurred.

Our qualified immunity analysis, [**18] however, does not end here. We must now consider the district court's legal conclusion that "at the time of plaintiff's initial forced haircut in 1996, the law was **clearly established** that prisoners retain the right to religious freedom and that prison officials may not deny inmates a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." J.A. at 235 (D. Ct. Order of 8/24/99) (quotation omitted) (emphasis added). In light of our decision in **Pollock**, we hold that the district court erred in concluding that the law was clearly established.

Flagner bears the burden "to allege and prove that the defendant official violated a clearly established constitutional right." ***Buckner, 36 F.3d at 539.*** In **Pollock v. Marshall**, we upheld the application of an earlier version of the challenged Ohio prison grooming regulation in an action involving a Lakota American Indian who sought to enjoin prison officials from cutting his hair in violation of his religious beliefs. **See *Pollock v. Marshall, 845 F.2d 656, 659-60*** (6th Cir.), **cert. denied,** [**19] ***488 U.S. 897, 102 L. Ed. 2d 228, 109 S. Ct. 239 (1988).*** We held that "after balancing the defendant's interest in keeping prisoners' hair short against the right of the plaintiff to exercise the religion of the Lakota Indians, ... the regulation restricting hair length, **as applied** to the plaintiff, is not unconstitutional." **Id.** (emphasis added). The defendants in **Pollock** raised several legitimate penological concerns such as, "quick identification, removal of a place to hide small contraband, prevention of sanitation problems," and increased risk of sexual attacks on inmates with longer hair because "longer hair increases the attractiveness of an inmate to other inmates." ***Id. at 659.***

Although **Pollock** involved a challenge by a Lakota American Indian to an earlier version of § 5120-9-25(F) and in this case, Flagner, an Hasidic Orthodox Jew, brings a challenge to the current § § 5120-9-25(D) and (F), "it need not be the case that 'the very action in question has previously been held unlawful." ***Dickerson, 101 F.3d at 1158*** (quoting ***Anderson, 483 U.S. at 640***). To deny qualified immunity [**20] protection to the defendants, the law requires that "in the light of pre-existing law the unlawfulness must be apparent." **Id.** (quoting ***Anderson, 483 U.S. at 640***). [*483]

Based on our decision in **Pollock** which upheld an application of the challenged prison regulation, we conclude that Flagner's right to grow his beard and sidelocks in contravention of the Ohio prison grooming regulation at the time of his forced cutting was not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Russo, 953 F.2d at 1042*** (quoting ***Anderson, 482 U.S. at 640***). We also recognize that our decision in **Pollock** has been followed in several unpublished opinions upholding the application of the Ohio prison grooming regulation at issue in this case. Because Flagner has not satisfied his burden to establish that the "defendant officials violated a clearly established constitutional right," ***Buckner, 36 F.3d at 539,*** the defendants are entitled to qualified immunity solely with respect to Flagner's money damages claims. It is thus unnecessary for us to consider the final prong [**21] of the qualified immunity analysis. Accordingly, we **REVERSE** the district court's denial of summary judgment to the defendants based on qualified immunity.

C. Declaratory and Injunctive Relief

The defense of qualified immunity protects officials from individual liability for money damages but not from declaratory or injunctive relief. See *Collyer v. Darling*, *98 F.3d 211, 228 n.18 (6th Cir. 1996)*, **cert. denied**, *520 U.S. 1257 (1997)*; *Cagle v. Gilley*, *957 F.2d 1347, 1350 (6th Cir. 1992)*. Thus, our reversal of the district court's denial of summary judgment based on qualified immunity does not preclude Flagner from going forward with his as-applied challenge to the Ohio prison grooming regulation insofar as he seeks declaratory and injunctive relief. "In considering a challenge to a prison policy as applied, the proper inquiry is whether the actions of the prison officials are reasonably related to legitimate penological interests." *Skelton v. Pri-Cor, Inc.*, *963 F.2d 100, 103 (6th Cir. 1991)*, **cert. denied**, *503 U.S. 989, 118 L. Ed. 2d 398, 112 S. Ct. 1682 (1992)* (citing [**22] *Thornburgh v. Abbott*, *490 U.S. 401, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)*).

Flagner seeks declaratory and injunctive relief to prevent the defendants from forcibly cutting his beard and sidelocks in the future. Although we relied on our decision in **Pollock** to conclude here that the defendants are entitled to qualified immunity with respect to Flagner's damages claims, our holding in **Pollock** does not necessarily resolve the question of whether the defendants may in the future, continue forcibly to cut Flagner's beard and sidelocks.

Inmates retain rights to free exercise of religion. Prison officials may impinge on these constitutional rights only if the regulation "is reasonably related to legitimate penological interests." *Turner*, *482 U.S. at 89*. While courts should generally defer to the expertise of prison officials in matters involving prison administration, this deference is only afforded "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response." *Wolfish*, *441 U.S. at 548*. The plaintiff here, unlike the plaintiff in **Pollock** who did not challenge [**23] the factual underpinnings of the prison officials' justifications, has presented sufficient evidence to raise questions about the validity of the defendants' asserted penological interests.

As the Supreme Court directed in **Turner v. Safley**, courts employ a four-factor analysis to determine whether a prison regulation is reasonably related to legitimate penological interests. n5 See *Spies*, [*484] *173 F.3d at 403* (citing *Turner*, *482 U.S. at 89*). These factors are not necessarily weighed evenly, see *173 F.3d at 403-04*, but rather they are guidelines for the court to assess whether the prison officials' actions are reasonably related to a valid penological basis. See *Whitney v. Brown*, *882 F.2d 1068, 1076 (6th Cir. 1989)*. Under the first factor, the court must consider whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, *482 U.S. at 89* (quotation omitted). "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render [**24] the policy arbitrary or irrational." *Id. at 89-90*.

n5 Judge Nelson's reliance on *Spies v. Voinovich*, *173 F.3d 398, 403-04 (6th Cir. 1999)*, for the proposition that under **Turner**, courts are not to subject challenged prison regulations to "a four-factor analysis tailored to the plaintiff's individual circumstances" ignores controlling Supreme Court precedent. In **Thornburgh v. Abbott**, the Supreme Court considered both a facial and an as-applied challenge to a federal prison regulation concerning the receipt of subscription publications by inmates. See *Thornburgh v. Abbott*, *490 U.S. 401, 403, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)*. Applying the **Turner** analysis, the Court concluded that the prison regulation at issue was facially valid; however, the Court remanded to the district court for further examination of the plaintiffs' as-applied challenges concerning 46 publications introduced at trial. *Id. at 404*. Under Judge Nelson's interpretation of **Turner**, as-applied challenges to prison regulations would be virtually impossible. The Supreme Court's decision in **Abbott**, however, demonstrates that under **Turner**, plaintiffs may pursue as-applied challenges to facially valid prison regulations.

Moreover, in **Spies**, we upheld the constitutionality of a prison regulation prohibiting inmate-led groups, concluding that **Turner** factors three and four "do not cut in favor of Spies, for he has also not demonstrated that the safety concerns of prison officials related to accommodating his requests are exaggerated and does not offer any 'alternative means' by which prison officials can mollify their security concerns." *Spies*, *173 F.3d at 406*. Thus, our own analysis in **Spies** demonstrates that "the plaintiff's individual circumstances" are indeed relevant in applying the **Turner** analysis. Unlike the inmate in **Spies**, Flagner has presented sufficient evidence that the prison officials' response to a supposed security concern was exaggerated. See discussion **infra** Part III.C.1. Flagner has also offered an alternative means which would accommodate his religious beliefs "at **de minimis** cost to valid penological interests." *Turner*, *482 U.S. at 91*; **see also** discussion **infra** Part III.C.2.

[**25]

The final three **Turner** factors should be balanced together. The second **Turner** factor to consider is "whether there are alternative means of exercising the right that remain open to prison inmates." **Turner**, *482 U.S. at 90*. The third **Turner** factor we consider "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." **Id.** "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." **Id.** With respect to the fourth **Turner** factor, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." **Id.** Likewise, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." **Id**. "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional [**26] complaint." ***Id.** at 90-91*. However, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at **de minimis** cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." ***Id.** at 91*.

1. **Turner** Factor One

In consideration of the first **Turner** factor, we now ask whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." ***Turner**, 482 U.S. at 89* (quotation omitted). Defendant Wingard stated that the prison grooming regulation is necessary because "long hair and thick, [*485] full beards and sideburns provide good hiding places for such contraband as drugs and weapons." J.A. at 80 (Wingard Aff., P 4). In the past, Defendant Wingard has recovered items such as tobacco, marijuana, and a razor blade from the hair of Ohio inmates. J.A. at 80 (Wingard Aff., P 4). However, with respect to Flagner specifically, no contraband has ever been recovered by prison staff during any search of his beard and sidelocks. [**27]

The defendants next assert that the grooming regulation is necessary to promote their "compelling interest in maintaining security within Ohio's prisons by freeing staff members from the increased demands on their time that would otherwise result from the more frequent, wide ranging and lengthier searches that would be necessary to attempt to control contraband." J.A. at 81 (Wingard Aff., P 6). Defendant Wingard continued, "additional staff are simply not available to conduct the more frequent and time consuming searches that would be necessary if the Hair Length Regulations were not consistently enforced." J.A. at 82 (Wingard Aff., P 7). Despite this facially appealing justification, Defendant Wingard conceded that no additional staff members were ever hired and no overtime was ever authorized to accommodate increased security demands caused by Flagner and the four Native American inmates when they were exempted from the regulation. J.A. at 260, 298 (Wingard Dep.). Moreover, the defendants are unaware of any additional security precautions that were ever taken on account of Flagner that exceeded the security precautions taken for inmates who complied with the hair length regulation. [**28] J.A. at 260 (Wingard Dep.). Defendant Wingard was also unaware of any security problems specifically attributed by prison staff to Flagner's beard and sidelocks. J.A. at 260 (Wingard Dep.).

The defendants also contend that the regulation "furthers the compelling interest in maintaining security in Ohio's prisons by reducing the danger of injury to staff members and the tension that would otherwise follow from the increased close and/or physical contact resulting from the more frequent and more invasive searches that would be necessary to deal with contraband in inmates' hair." J.A. at 82 (Wingard Aff., P 8). This rationale, however, is completely undermined by the fact that these cursory searches required minimal, if any, physical contact between the prison staff and Flagner, and involved Flagner running his own fingers through his beard and sidelocks, which took approximately two to three seconds to perform. Furthermore, the defendants have only searched Flagner's beard and sidelocks on a few occasions. Assuming that "the potential for injury to staff increases in direct proportion to the extent of their physical contact and physical proximity to inmates," J.A. at 82 (Wingard [**29] Aff., P 8), given the minimal contact between the staff and Flagner and the infrequency of searches, which he essentially performs on himself, the risk of increased injury to the defendants caused by exempting Flagner from the regulation appears to be nominal.

Next, the defendants proffer that the grooming regulation is justified because it reduces gang activity by suppressing "gang identifiers." J.A. at 87 (Wingard Aff., P 17). According to Defendant Wingard, the regulation promotes uniform appearance "that allows corrections officials to more readily detect the use of hair as an identifier"; moreover, "limitations on the quantity of hair on an inmate[]'s head limits the number of ways in which the hair style can be modified for use as an identifier." J.A. at 88 (Wingard Aff., P 21). Although it may be true that the challenged grooming regulation, as a general

matter, helps alleviate the proliferation of "gang identifiers," there is no evidence in the record that Flagner's beard and sidelocks have ever been mistaken for a "gang identifier."

Next, the defendants assert that the grooming regulation is needed to promote ready identification of escaped inmates. [*486] Allowing an inmate [**30] to grow "long hair or a thick, full beard can [permit the inmate to] dramatically alter his appearance upon escape by changing his hair and beard length and/or style." J.A. at 89 (Wingard Aff., P 24). The defendants argue that it is administratively burdensome to update continually their record of inmate photographs if inmates were allowed to alter their appearance by growing long hair or thick facial hair. The defendants further contend that "it is essential to distribute an accurate picture of an escapee as quickly as possible after an escape and having to distribute multiple pictures is more difficult." J.A. at 90 (Wingard Aff., P 25).

The grooming regulation, however, does not completely prevent the risk of an escapee altering his own appearance after escaping from prison. With respect to Flagner specifically, there is no evidence in the record that he has ever attempted to escape from prison. In addition to a photograph of Flagner, the defendants also have on file four professionally-made sketches of him bearing various beard and sidelock lengths and one sketch of Flagner with no facial hair at all. In the event that Flagner ever escaped from prison, these sketches [**31] would help to identify him because they show a range of his possible appearances.

Finally, the defendants argue that "long hair can lead to increased plumbing problems by making clogged drains more frequent." J.A. at 91 (Wingard Aff., P 27). Even if we were to assume this to be true as a general matter, there is no evidence in the record that any clogged drains were ever attributed to Flagner's beard or sidelocks.

Based on the defendants' asserted justifications, followed by Flagner's demonstration of the lack of a factual basis for those justifications as applied to himself, the first **Turner** factor weighs heavily in favor of Flagner. The defendants have not had any security problems with Flagner, nor have they spent additional resources to provide extra security to perform searches of his beard and sidelocks. The defendants have multiple sketches of Flagner for ready distribution if he ever escaped. Finally, nothing in the record suggests that Flagner's beard and sidelocks have ever clogged the sinks or showers of the prison.

2. Turner Factors Two, Three, and Four.

Looking to the second **Turner** factor, there are no alternatives that remain open to [**32] Flagner in the exercise of his religion should the grooming regulation be upheld. None of the other aspects of Flagner's religion could ever compensate for the fact that an essential tenet of his religious beliefs prevents him from cutting his beard or sidelocks, and that enforcement of the grooming regulation would require the plaintiff to violate this very tenet.

As to the third **Turner** factor, the evidence in the record shows that no prison resources were ever diverted to accommodate the plaintiff and the then-exempted Native American inmates. J.A. at 294 (Wingard Dep.). The defendants also admitted that no extra guards were ever hired or overtime authorized to respond to additional security risks by Flagner and the other then-exempted inmates. J.A. at 260, 298 (Wingard Dep.). There is also no evidence in the record that other inmates resented Flagner because he was allowed at one time to grow out his beard and sidelocks.

The lack of an undue impact "on guards and other inmates, and on the allocation of prison resources generally," ***Turner**, 482 U.S. at 90*, also speaks to the final factor which is that having Flagner search his own beard is an "alternative [**33] that fully accommodates the plaintiff at **de minimis** cost to valid penological interests." ***Id.** at 91*. The defendants have already admitted that the accommodation of Flagner and the four Native American inmates did not cause the [*487] institution any financial hardship. J.A. at 294 (Wingard Dep.).

On balance, the second, third, and fourth **Turner** factors also weigh heavily in favor of Flagner because they demonstrate a lack of viable alternatives for Flagner to exercise his religion should the regulation be upheld, as well as the absence of an undue negative impact on the prison community and its resources. Thus, looking at the totality of all four **Turner** factors, Flagner has presented sufficient evidence which raises serious questions concerning the validity of the defendants' asserted penological interests. As we noted earlier, courts generally defer to the expertise of prison officials "in the adoption and execution of polices and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." ***Wolfish**, 441 U.S. at 547*. In **Brown v. Johnson**, we concluded [**34] that "as long as prison authorities present evidence to support their judgment that prison security will be undermined in the absence of a challenged regulation, we will not substitute our judgment for theirs." ***Brown v. Johnson**, 743 F.2d 408, 412-13 (6th Cir. 1984)*, **cert. denied sub nom. *Inosencio v. Johnson***, *469 U.S. 1215, 84 L. Ed. 2d 336, 105 S. Ct. 1190 (1985)*. However, we afford no deference

to the policies and judgments of prison officials if there is "substantial evidence in the record to indicate that the officials have exaggerated their response." ***Pell***, *417 U.S. at 827*.

Consistent with these principles, in **Whitney v. Brown** we held that a prison policy which prohibited the intercomplex travel of six Jewish inmates for Sabbath services and annual Passover Seders was "an exaggerated response to speculative security objectives, and, therefore it was invalid." ***Whitney***, *882 F.2d at 1078*. In **Whitney**, we rejected a conclusory approach where "anything prison officials can justify is valid because they have somehow justified it." ***Id.*** *at 1074*. Like the defendants in **Whitney**, [**35] the defendants here have articulated a list of generalized concerns regarding the impact of exempting Flagner from the grooming regulation. Flagner, however, has demonstrated the absence of a factual basis for these penological concerns and has thereby called into question the credibility of those assertions. Resolution of these credibility issues can be best achieved by the trial judge during further proceedings regarding Flagner's as-applied challenge to the grooming regulation.

Flagner is the only Orthodox Jew at MaCI, which has a population exceeding 2,500 inmates, who is requesting an exemption from the Ohio prison grooming regulation based on religious reasons. J.A. at 274-75 (Wingard Dep.). The fact that the defendants managed to wait five years before forcibly cutting Flagner's beard and sidelocks from June 1991 to July 1996 only further suggests that the defendants may be exaggerating their response to the potential security threats posed by permitting Flagner to grow his beard and sidelocks in a manner that is consistent with his religious beliefs.

Our reversal of the district court's denial of summary judgment based on qualified immunity does not preclude Flagner's [**36] as-applied challenge to the Ohio prison grooming regulation from proceeding. Accordingly, we **REMAND** to the district court for further consideration of Flagner's claims for declaratory and injunctive relief.

IV. CONCLUSION

Based upon the foregoing, the district court's order denying the defendants' motion for summary judgment based on qualified immunity is **REVERSED** insofar as Flagner seeks damages. Flagner may, however, continue with his action seeking declaratory and injunctive relief against the application of the Ohio prison grooming regulation, having presented a genuine issue of material fact regarding the validity of the defendants' penological justifications [*488] for the regulation. We therefore **REMAND** to the district court to allow Flagner's as-applied challenge seeking declaratory and injunctive relief to proceed.

CONCURBY:
DAVID A. NELSON (In Part)

DISSENTBY:
DAVID A. NELSON (In Part)

DISSENT:

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. I concur in the conclusion that the qualified immunity doctrine bars plaintiff Flagner from attempting to mulct the defendants in damages for requiring him to comply with Ohio's prison regulation [**37] regarding facial hair. But because I believe that the defendants are entitled to prevail at the first stage of the qualified immunity analysis - **i.e.**, because I believe that the application of the regulation to Mr. Flagner is permissible under the Constitution as a matter of law - I would not let the claims for declaratory and injunctive relief go forward.

The district court's first-stage rationale was as follows:

"Material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. *** Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns."

My colleagues on the panel agree with this rationale. I respectfully disagree. I am aware of no basis on which the regulation could properly be held invalid on its face, and it seems to me that the very existence of the regulation justifies its enforcement against Mr. Flagner.

Even under the restrictive statutory standard rejected by the Supreme Court in ***City of Boerne v. Flores***, *521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)*, [**38] the constitutionality of regulations such as Ohio's was routinely upheld. See, for example, ***Harris v. Chapman***, *97 F.3d 499, 504 (11th Cir. 1996)*, and ***Hamilton v. Schriro***, *74 F.3d 1545 (8th Cir. 1996)*. Post-**Boerne** decisions, of course, have reached the same result. See, **e.g.**, ***Green v. Polunsky***, *229 F.3d 486 (5th Cir. 2000)*, and ***Kimbrough v. California***, *No. 00-15075, 2001 U.S. App. LEXIS 1864 (9th Cir. 2001)*. Within this circuit, Ohio's prison hair regulation has repeatedly been upheld against challenges under the Free Exercise Clause of the First Amendment. See ***Williams v. Wilkinson***, *No. 96-3715, 1997 U.S. App. LEXIS 36760 (6th Cir. 1997)*;

Brown v. Wilkerson, No. 94-4014 (6th Cir. 1995); ***Pollock v. Marshall***, *845 F.2d 656 (6th Cir. 1988)*. See also ***Mays v. Wilkinson***, *1999 U.S. App. LEXIS 8380*, No. 98-3341 (6th Cir. 1999) (unpublished order) (affirming dismissal for failure to state a claim where Ohio hair regulation was challenged under constitutional provisions other than the Free Exercise Clause).

I do not read ***Turner v. Safley***, *482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*, [**39] as suggesting that an "as applied" approach can routinely be used to circumvent a well-established body of law such as that upholding the Ohio regulation. Speaking through Justice O'Connor, the **Turner** Court noted that "running a prison is an inordinately difficult undertaking that requires expertise ... peculiarly within the province of the legislative and executive branches of government." ***Id.*** *at 84-85*. Moreover, the Court continued, "prison administration is ... a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." ***Id.*** *at 85*. Against this background, and after an analysis of the facial validity of challenged Missouri prison regulations under the four "factors" discussed in the majority opinion here, the **Turner** Court upheld the validity of the first of the regulations (a prohibition against correspondence between inmates at different state prisons) on the ground that, as a matter of law, it was "reasonably related to legitimate security [*489] interests." ***Id.*** *at 91*. The same sort of categorical analysis led the **Turner** [**40] Court to invalidate the other challenged regulation, a ban on inmate marriages.

The **Turner** opinion does not imply that an inmate who seeks to challenge a prison regulation the constitutionality of which has already been established is entitled to have the regulation subjected to fresh scrutiny under a four-factor analysis tailored to the plaintiff's individual circumstances. In a published opinion by which I should have thought this panel bound, our circuit has flatly rejected the idea that prisoners are entitled to this sort of individual fitting:

"By creating the **Turner** test, the Supreme Court surely did not intend to provide a mechanism through which prisoners could mount repeated challenges to prison regulations and require courts to analyze, in detail, the impact such regulations would have in any particular factual setting, even if prior court precedent would seem to dictate the validity of the regulations. On the contrary: the Supreme Court's creation of the **Turner** standard was motivated by a desire to 'ensure[] the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems [**41] of prison administration, and avoid[] unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree.' ***O'Lone***, *482 U.S. at 349* (quotation marks omitted). Penal authorities may need a clear rule for dealing with certain continuing or recurring situations, even when that rule could be better-tailored to the rights of individual prisoners through a court's flexible, case-by-case analysis." ***Spies v. Voinovich***, *173 F.3d 398, 403-04 (6th Cir. 1999)*.

It may be true, I suppose, that if Mr. Flagner were the only inmate in the Ohio prison system he could show that the hair regulation is not reasonably related to legitimate security interests peculiar to him. It may be true, in other words, that Mr. Flagner himself has never concealed contraband in his beard or sidelocks; that prison officials could easily and safely assure themselves of Mr. Flagner's continuing good behavior by having him run his own fingers through his hair; that no security problems of any kind have ever been associated with Mr. Flagner's facial hair; that his beard and sidelocks have never been mistaken for a "gang identifier;" that he has never [**42] attempted to escape from prison; that if he were to escape and shave off his facial hair in an effort to make himself harder to recognize, the effort would be unsuccessful because the authorities happen to have old photographs and sketches depicting him without such hair; and that Mr. Flagner's beard and sidelocks have never contributed to the clogging of drains in the prison's plumbing system. If all this were shown to be true, if we were writing on a clean slate, and if Mr. Flagner were Ohio's only prison inmate, I might well agree with my colleagues that the regulation should not be allowed to burden Mr. Flagner's right to put into practice his religious beliefs concerning facial hair.

But we are not writing on a clean slate, and Mr. Flagner, unfortunately, is not Ohio's only prison inmate. As of January 2001, according to an Ohio Department of Rehabilitation and Correction "Fact Sheet" available on the internet at www.drc.state.oh.us, Ohio's prison inmate population was 45,540. If three percent of the state's male prison population were to accept the majority opinion's implied invitation to challenge the regulation on grounds comparable to those Mr. Flagner is being [**43] allowed to invoke here, the **Turner** factors would have to be separately weighed by the courts in something like 1,000 cases. And that is just in Ohio.

Such an outcome, in my view, would be undesirable. It would also be difficult to reconcile with the proposition - explicitly alluded to in **Turner** - that "judgments regarding prison security 'are peculiarly [*490] within the province and professional expertise of corrections officials ....'" *482 U.S. at 86* (quoting ***Pell v. Procunier***, *417 U.S. 817, 827, 41 L. Ed. 2d 495, 94 S. Ct. 2800) (1974)*.

The conclusion that Mr. Flagner's claim is without legal merit finds support, I believe, in ***Employment Division, Department of Human Resources of Oregon v. Smith***, *494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*, a decision handed down three years after the decision in **Turner**. The question in **Smith** was whether the State of Oregon could deny unemployment benefits to people who had been fired from their jobs for ingesting a prohibited hallucinogen (peyote) in connection with sacramental activities at a Native American church. The Supreme Court answered in the affirmative, [**44] reasoning that where the state's object is not to prohibit or burden the exercise of religion, and any burden imposed by the state is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." ***Smith***, *494 U.S. at 878*.

Unlike ***O'Lone v. Estate of Shabazz***, *482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987)*-- a case where, as the **Smith** Court noted *(494 U.S. at 884)*, a prison's refusal to excuse inmates from work to attend worship services was sustained without mention of a "balancing" test - **Smith** did not involve a prison regulation. Oregon's prohibition against the payment of benefits to jobless users of illegal drugs was applicable to the citizenry of the state as a whole. And if the state's blanket prohibition against the payment of benefits to such people was sustainable notwithstanding its incidental effect on the religious practices of adherents of the Native American Church, it would seem to follow **a fortiori**, given the need for judicial restraint in the prison context, that a regulation such as the one at issue here should be [**45] sustainable notwithstanding the incidental burden it may place on the religious tenets of some prisoners.

The **Smith** Court was obviously content to follow a categorical approach in determining the constitutionality of the Oregon law. The Court seemed to take it for granted that because the law was constitutional as generally applied, the plaintiffs had no viable free exercise claim. n1 This reading is strengthened by the latter part of the **Smith** opinion's penultimate paragraph, where the Court rejected the idea that a religious-practice exception to the [*491] general rule was mandated by the First Amendment:

"But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which [**46] judges weigh the social importance of all laws against the centrality of all religious beliefs." ***Smith***, *494 U.S. at 890*.

n1 It is true, as my colleagues on the panel point out in note 5 of the majority opinion, that a Federal Bureau of Prisons regulation banning the delivery to prisoners of periodical publications found "detrimental to institutional security" - a regulation held to be valid on its face - could be found invalid as applied to a particular publication. See ***Thornburgh v. Abbott***, *490 U.S. 401, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)*. But I do not read **Thornburgh v. Abbott** as justifying a remand in the case at bar.

Here, as in **Turner v. Safley**, the plaintiffs would have been free, had this been a case of first impression, to attempt to show that the challenged regulation represented an "exaggerated response" to prison concerns, given the alleged existence of "obvious, easy alternatives ...." See ***Turner***, *482 U.S. at 90*. Had such a showing been made, a court could have considered it "as evidence that the regulation does not satisfy the reasonable relationship standard ...." ***Id.*** *at 91*. But our court has already held, in a Free Exercise Clause context quite similar to the context in which the present appeal arises, that **Turner** cannot justify a remand for factfinding of the sort contemplated by my colleagues on the panel. See ***Spies v. Voinovich***, *173 F.3d at 407*. Such a remand, as **Spies** declared, "would be the type of 'unnecessary intrusion of the judiciary' into 'problems of prison administration' that **O'Lone** warned against." **Id.**

I can readily understand why my colleagues might wish that the judge who urged a remand in **Spies** had been writing the majority opinion rather than the dissent, just as I can readily understand why they might wish that the views of the Supreme Court justices who urged a remand in **O'Lone** had prevailed. But given the majority holdings in **Spies** and **O'Lone**, and given the post-**Abbott** holding in **Employment Division v. Smith**, I have greater difficulty understanding how it can be thought that we are free to order a remand here.

[**47]

Insofar as my colleagues on the panel have concluded that the courts can and should discern

appropriate occasions for waiving Ohio's prison hair regulation on a case-by-case basis. I respectfully dissent.

(3)

Supreme Court, U.S.
FILED
SEP 24 2001
CLERK

No. 01-324

In the

Supreme Court of the United States

Reginald A. Wilkinson, et al.,

Petitioners,

v.

Hbrandon Lee Flagner,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF AMICI INTEREST

The amici States have a compelling interest in protecting the security of their prisons through the uniform application of prison regulations intended to protect corrections officers, to inhibit inmate escapes, and to facilitate the secure and orderly operation of correctional institutions. The Sixth Circuit's decision to scrutinize constitutionally valid prison disciplinary regulations on a case-by-case basis for the purpose of creating individual-inmate exceptions to those rules, merely because certain prisoners happen to have no history of serious disciplinary infractions, threatens the security of prisons nationwide by unnecessarily restricting State prison officials in the execution of their responsibilities. The potential impact of the Sixth Circuit's ill-considered and legally flawed decision on the operation of State correctional facilities, and the resulting threat to public safety, warrant review by this Court.

The Sixth Circuit has determined, contrary to the holdings of this Court and other courts of appeals, that the judiciary may decide, on a case-by-case basis, whether a specific inmate may be exempted from abiding by constitutionally valid prison regulations. This decision challenges the efforts of this Court to protect the deference given to prison administrators in maintaining security in correctional facilities. Specifically, this Court has repeatedly found that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (*citing Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977)). Thus, "[p]rison administrators...should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* As a result, "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations" because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Turner v. Safley*, 482

U.S. 78 (*citing Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

Nevertheless, the Sixth Circuit has found that the judiciary may substitute its judgment for that of State prison officials to determine whether a particular inmate may be exempted from valid prison regulations based on the inmate's prior disciplinary history. If the Sixth Circuit's decision is permitted to stand, the corrosive impact on prison safety will grow as the number of inmates seeking exemptions from otherwise generally applicable regulations rises. Moreover, if the courts substitute their judgment for that of prison officials and permit exemptions for individual inmates from security regulations, the ability of prison officials to maintain security will inevitably falter, thereby placing the safety and welfare of prison staff, inmates, and the general public at risk.

The Petition for Certiorari filed by the State of Ohio details how the decision of the Sixth Circuit conflicts with the legal precedents of this Court and the decision of other courts of appeals and highlights the detrimental effect of the Sixth Circuit's decision on prison security. The amici States bring to the Court's attention the widespread effect of this decision on state correctional facilities nationwide. In light of the dangerous implications to prison security presented by the Sixth Circuit's decision and the importance of the issue presented in the petition, the amici States join Ohio in urging the Court to grant certiorari.

SUMMARY OF ARGUMENT

Review of the question presented by the petition is a matter of critical importance to the amici States because the decision by the Sixth Circuit to allow individual inmates to litigate, on a case-by-case basis, whether the inmate may be exempted from a constitutionally valid prison regulation threatens the security of correctional institutions throughout the country. Despite this Court's unequivocal holding that "prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry," *Bell v. Wolfish*, *supra*, 441 U.S. at 546, the Sixth Circuit undermined the important work of State prison officials by arming inmates with a novel and potentially far-reaching method of evading appropriate and necessary prison regulations.

The decision of the Sixth Circuit, if not reversed, will certainly impact the States' ability to manage safely their prisons by erecting an obstacle to the enforcement of regulations created to prevent security problems, and to protect corrections officers, inmates and the public. If followed by other courts of appeals, the rationale of the Sixth Circuit will necessitate an unmanageable and unnecessary tracking by prison administrators of individual-inmate exceptions to hundreds of prison rules. Ultimately, the Sixth Circuit's decision to allow repeated inmate challenges to otherwise valid prison regulations will create an unworkable patchwork of regulations and exceptions that will neither be manageable nor enforceable in an institutional setting that requires order and security to survive.

ARGUMENT

THE DECISION OF THE SIXTH CIRCUIT TO ALLOW INDIVIDUAL-INMATE EXEMPTIONS FROM CONSTITUTIONALLY VALID PRISON SECURITY REGULATIONS THREATENS THE ORDERLY OPERATION OF CORRECTIONAL INSTITUTIONS NATIONWIDE, WARRANTING REVIEW BY THIS COURT.

The Sixth Circuit's decision creates both a security hazard within our nation's correctional institutions and offends this Court's precedents by removing security and administrative decisions from State prison officials in favor of the substituted judgment of the judiciary. The Sixth Circuit has determined that an inmate who seeks to challenge a prison regulation previously determined to be constitutional may subject the regulation to fresh scrutiny under an analysis tailored specifically to the individual inmate's circumstances. This determination is contrary to *Turner v. Safley, supra*, and other Supreme Court decisions. *See O'Lone v. Shabazz*, 482 U.S. 342 (1987); *Bell v. Wolfish, supra*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners Labor Union, supra*, 433 U.S. 119 (1977).

Contrary to the finding of the Sixth Circuit, this Court has routinely accorded a great amount of deference to the decisions of State prison officials regarding the administration, operation and security of their institutions. For example, in *Procunier v. Martinez, supra*, this Court expressed the importance of providing deference to the decisions of prison authorities. The Court found:

> Traditionally, federal courts have adopted a broad hands--off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More

> fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention . . . . Suffice it to say that the problems of prisons in America are complex and intractable, and . . . are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Procunier v. Martinez, supra, 416 U.S. at 404-405.

This Court has clearly provided that State prison administrators are to be accorded deference in the administration, operation and security of their institutions. For example, in *Bell v. Wolfish, supra*, this Court found that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish, supra*, 441 U.S. at 547, (*citing Jones v. North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 128). "[W]e have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'" *O'Lone v. Shabazz, supra*, 482 U.S. at 349.

In addition, contrary to the Sixth Circuit's finding that prison regulations may be subjected to repeated scrutiny on

the basis of the vagaries of each inmate's disciplinary history, this Court has specified that a State prison regulation, once found to meet constitutional muster, should not be subjected to repeated challenges. This Court's decision in *Turner v. Safley, supra*, is instructive with respect to the across-the-board application of constitutionally valid prison regulations to all inmates, rather than the case-by-case obstacle course mandated by the Sixth Circuit. As the dissenting judge in *Flagner* noted:

> By creating the *Turner* test, the Supreme Court surely did not intend to provide a mechanism through which prisoners could mount repeated challenges to prison regulations and require courts to analyze, in detail, the impact such regulations would have in any particular factual setting, even if prior court precedent would seem to dictate the validity of the regulations. On the contrary: the Supreme Court's creation of the *Turner* standard was motivated by a desire to "ensure the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, and avoid unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree."

Flagner v. Wilkinson, 241 F.3d 475, 489 (6th Cir. 2001)(Nelson, C.J., dissenting)(*citing O'Lone v. Shabazz, supra*, 482 U.S. at 349). Judge Nelson convincingly explained that:

> [t]he *Turner* opinion does not imply that an inmate who seeks to challenge a prison regulation the constitutionality of which has already been established is entitled to have the regulation subjected to fresh scrutiny under a four-factor analysis tailored to the plaintiff's individual circumstances.

Flagner v. Wilkinson, supra, 241 F.3d at 489.

Moreover, this Court has repeatedly recognized that "[m]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners . . . ." *Bell v. Wolfish, supra*, 441 U.S. at 546. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Id. (citing Pell v. Procunier, supra*, 417 U.S. at 823). Thus, "prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Id.*, 441 U.S. at 546. However, the decision of the Sixth Circuit hinders the ability of State prison administrators to operate safe and orderly prison facilities and, ultimately, contradicts this Court's instructions to protect the determinations of State prison officials.

The Sixth Circuit has overlooked the dynamics of prison life and the problems that lie therein and has placed prison security in jeopardy by doing so. Specifically, the court failed to recognize that prison security regulations are promulgated in anticipation of security problems because such regulations are necessary in order to discourage inmates from endangering safety, escaping, or disrupting correctional facilities. This Court has recognized that it is entirely appropriate for prison officials to enact disciplinary regulations as preventive measures. *See O'Lone v. Shabazz, supra*, 482 U.S. at 349 (corrections officials must have the ability "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). Nothing in this Court's precedents suggests that prison officials must wait for an inmate to create a risk to safety before imposing valid restrictions on prisoner behavior. To require such an approach would eliminate the ability of State officials to anticipate threats to security before they

occur and deter dangerous behavior through predictable and uniform application of disciplinary regulations.

The Sixth Circuit further fails to recognize that a personal exemption from regulations will permit an inmate to easily cause a security threat by implicitly authorizing otherwise prohibited and potentially dangerous conduct. Rather, the court bases its decision on the unrealistic prediction that simply because an inmate has not engaged in a specific security problem in the past he or she will continue to behave in an appropriate manner, even without the threat of discipline for misconduct. This reasoning is contrary to the findings of this Court and fails to consider the criminal element that is housed in our nation's prisons. It strains reason to suggest that convicted criminals will abide by prison regulations during their incarceration if they are aware that exceptions to the rules are doled out by the courts based on a lack of previous disciplinary infractions.

This Court has consistently recognized the unique dynamics of prisons and the resulting effect on security. For example, in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra*, 433 U.S. at 129, this Court explained:

> Prisons, it is obvious, differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance. In seeking a 'mutual accommodation between institutional needs and objectives (of prisons) and the provisions of the Constitution that are of general application . . . this Court has repeatedly recognized the need for major restrictions on a prisoner's rights.

(citations omitted).

Similarly, in *Procunier v. Martinez*, *supra*, 416 U.S. at 404, this Court noted that:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Hurculean obstacles to effective discharge of these duties are too apparent to warrant explication.

Despite the recognition by this Court that, due to the unfortunate but very real dangers presented by prison life State officials are to be given discretion by the judiciary in implementing security regulations, the Sixth Circuit has restricted that discretion by allowing the judiciary to substitute its judgment for that of State officials on a case-by-case basis whenever an inmate can demonstrate that he or she has not previously violated prison rules.

In effect, the decision of the Sixth Circuit will open numerous prison regulations, previously found by this Court to be constitutional, to a new round of judicial review in the federal courts and, ultimately, will produce dangerous results for prison security. For example, in *Turner v. Safley, supra*, this Court upheld a regulation promulgated by the Missouri Division of Corrections prohibiting inmate correspondence between prison institutions. Missouri prison officials provided testimony that the correspondence rule was security based because "mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts". *Id.*, 482 U.S. at 91. This Court found that the regulation reasonably related to legitimate security concerns of prison officials and upheld its validity. *Id.*

However, under the Sixth Circuit's analysis, inmates confined in a Missouri correctional facility could bring suit

against that State alleging that they should be exempted from the simply because, in the past, they had never used the mail to communicate escape plans or to arrange assaults or other violent acts. As a result, those inmates who qualified for exemptions could freely engage in the exchange of correspondence that communicates escape plans, assaults or other violent acts, the very dangers that the regulations were designed to prevent. Because of the individualized exemptions, Missouri officials would be unable to detect the security threat, the effectiveness of the rule would be severely hampered, and the security of Missouri's prisons jeopardized.

Similarly, in *Bell v. Wolfish, supra*, this Court upheld federal prison security regulations prohibiting receipt of books not sent directly from the manufacturer, as well as packages of food and personal items sent from outside of the prison. The reason for the rules was to keep individuals from smuggling contraband into the institution. *Id.*, 441 U.S. at 555. Under the Sixth Circuit's approach, this Court's decision in *Bell* would be subjected to repeated exemptions for any inmate who had never been caught smuggling contraband into the prison in the past. Such an exemption would enable inmates to smuggle contraband into the prison undetected. A weapon is no less dangerous if it is the first piece of contraband introduced by an inmate into the prison setting. Yet, the Sixth Circuit's decision would allow a free pass to traffic in weapons for any inmate who can demonstrate that he or she has not been adjudicated guilty of violating prison rules in the past.

Moreover, the decision of the Sixth Circuit to permit continual review of valid prison security regulations will have a detrimental effect on numerous State prison systems. For example, the New Jersey Department of Corrections (hereinafter "NJDOC") has adopted security regulations prohibiting participation in or possession of security threat group (gang) materials. *See New Jersey Admin. Code tit.* 10A, §4-4.1(a)*.010 (1999)(prohibiting participation in any activity

related to a security threat group); *N.J. Admin. Code tit.* 10A, §4-4.1(a)*.011 (1999)(prohibiting possession of security threat group materials). The intent of the regulations is to terminate gang-related violence within the NJDOC prison system. *See Blyther v. New Jersey Dep't of Corrections*, 730 A.2d 396 (N.J. Super. Ct. App. Div. 1999). Under the Sixth Circuit's analysis, inmates could mount numerous challenges to these regulations and be awarded judicially sanctioned exemptions merely because they had not previously engaged in gang-related violence. These "exempted" inmates could subsequently possess gang paraphernalia and participate in security threat group activities with impunity until their actions resulted in a breach of security. Until that time, these prisoners could easily congregate and plan gang-related violence, the exact result the regulations were intended to prevent. The threat to prison security in such circumstances is obvious and is in no way mandated by law.

Similarly, security regulations and policies, such as regulations regarding substance abuse testing, grooming, inmate searches, limitations on mailing and phone use, among other security regulations, will be jeopardized if the decision of the Sixth Circuit were to be adopted by other courts of appeals. *See Alaska Admin. Code tit.*, §05.069 (Alaska Department of Corrections security regulation permitting the substance abuse screening of inmates); *New York Comp. Codes R. & Regs. tit.*7, § 200.2 (New York Department of Corrections security regulation allowing the searches of inmates after visitation to prevent the possession of contraband); 37 *P.A. Code* §93.2 (Pennsylvania Department of Corrections security regulation permitting the opening and examination of incoming inmate mail to prevent the entry of contraband); *Michigan PD* § 04.04.113 (Michigan Department of Corrections Policy Directive permitting the identification and management of security threat groups and their members); *Ohio Admin. Code* § 5120-9-25(D)(F) (Ohio Department of Corrections security regulation requiring inmate compliance with grooming specifications for the

detection of contraband). Notably, most States have enacted similar regulations and policies in anticipation of prison security issues that would be directly affected by the rationale of the Sixth Circuit. If the decision of the Sixth Circuit is permitted to stand as a viable option for other courts of appeals, countless inmates may be exempted from these and other prison security regulations, resulting in the unencumbered ability of inmates to wreak havoc on our nation's prison security.

Moreover, the decision of the Sixth Circuit invites a dangerous lack of uniformity in the application of prison rules. Equal treatment of inmates in the context of disciplinary decisions is essential to the perception of fairness among prisoners. However, an even-handed application of security regulations is not possible if individual inmates can claim an exemption from rules that are applicable to other prisoners.

The potential effect of the Sixth Circuit's decision clearly offends the precedents of this Court that allows State prison officials to promulgate policies in anticipation of dangerous activity by inmates. *See O'Lone v. Shabazz, supra*, 482 U.S. at 349. Moreover, the *Flagner* decision contradicts this Court's mandate that State prison officials be accorded judicial deference in matters of security and prison administration. *See Turner v. Safley, supra,* 482 U.S. 78; *Pell v. Procunier, supra,* 417 U.S. 817; *Bell v. Wolfish, supra,* 441 U.S. 520. If permitted to stand, the decision of the Sixth Circuit will jeopardize the ability of the States to maintain security in their prisons, thereby placing the safety and welfare of prison staff, inmates and the general public at risk.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Dated: September 21, 2001

(4)

Supreme Court, U.S.
FILED
OCT 3 2001
CLERK

No. 01-324

In The Supreme Court Of The United States

REGINALD A. WILKINSON, et al.,
Petitioners,

v.

HBRANDON LEE FLAGNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The Supreme Court Of The United States

No. 01-324

REGINALD A. WILKINSON, et al.,
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HBRANDON LEE FLAGNER,
Respondent.

REPLY BRIEF FOR THE PETITIONERS

The State of Ohio seeks review of a Sixth Circuit decision that gives prison inmates new opportunities to challenge generally-applicable prison regulations, even after those regulations have been upheld in court. According to the court of appeals, the States must not only show that legitimate penological interests underlie any prison regulation that limits inmates' constitutional rights – a view that we certainly accept – but the States now must also show that any such regulation is appropriate for *each* inmate in light of that inmate's unique personal history and circumstances. That latter burden on prison officials' authority is new, and it finds no support in decisions of this Court or of the other circuit courts of appeals.

Respondent Flagner argues that he showed the courts below that Ohio has no legitimate penological interest in

enforcing a beard-length restriction for the State's prisoners. Yet that was not what the court of appeals said. If it were, then of course this case would indeed involve, as Flagner claims, a straightforward application of *Turner v. Safley*, 482 U.S. 78, 89 (1987), for that case requires the government to show a rational connection between its rights-infringing regulations on the one hand and the government's legitimate penological interests on the other.

The court of appeals did not conclude that Ohio lacks legitimate penological interests in enforcing a short-beard rule in the State's prisons, however. In other words, the court never said that Ohio prison officials are wrong in their view that long beards on inmates pose a general safety threat for prison guards and for other inmates. Indeed, the court of appeals had, in an earlier published decision, expressly approved Ohio's prison hair-length rule and the "legitimate penological interests" that support it. See *Pollack v. Marshall*, 845 F.2d 656, 659 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988).

Instead, the court of appeals said in this case that Ohio's beard-length rule, even if it advances legitimate penological interests in state prisons generally, may not be enforced against *this* prisoner, because state officials have not shown that *this* prisoner and *this* beard pose the kind of safety threat that the short-beard rule is designed to limit in the prison population as a whole. See Pet. App. 13a-14a, 21a (listing "several legitimate penological concerns" underlying Ohio's hair-length restrictions, but refusing to let state officials enforce those safety-driven rules against Flagner, since those officials "have not had any security problems" with him). It is that latter prisoner-specific twist on *Turner* that is new and that warrants review now, for as we showed in the petition, the other circuit courts of appeals have not

imposed on the government a similar obligation to justify each regulation anew for each prisoner.

In paragraph after paragraph, the court of appeals found no flaw in the connection between Ohio's asserted penological interests and the short-beard rule – the kind of connection that *Turner* requires – and yet agreed with Flagner that he nonetheless might be entitled to an exemption from the rule simply because state officials have not shown that he in particular poses a danger to others. See, e.g., Pet. App. 18a (acknowledging evidence that state prison officials have "recovered items such as tobacco, marijuana, and a razor blade from the hair of Ohio inmates," and yet discounting that legitimate penological concern because "with respect to Flagner specifically, no contraband has ever been recovered by prison staff during any search of his beard and sidelocks"); Pet. App. 19a-20a (noting that prison officials are concerned about the extra staff time and potential dangers that staff members might face during frequent searches of inmates' beards, but discounting those legitimate concerns because prison officials have not hired additional staff to search Flagner's beard in particular, and have not searched his beard often); Pet. App. 20a (citing evidence that restrictions on facial hair help prison officials control gang activity, and even acknowledging that "it may be true that the challenged grooming regulation, as a general matter, helps alleviate the proliferation of 'gang identifiers,'" but discounting that legitimate penological concern because "there is no evidence in the record that Flagner's beard and sidelocks have ever been mistaken for a 'gang identifier'"); Pet. App. 20a-21a (describing state officials' concern that bearded inmates can dramatically alter their appearance by shaving, and acknowledging that those changes could make any escapees harder to identify, yet discounting that concern because

"[w]ith respect to Flagner specifically, there is no evidence in the record that he has ever attempted to escape").

To be sure, Flagner points to cases in which this Court and others have called for an "as applied" examination of prison regulations. Yet in neither of the cases that he cites – *Thornburgh v. Abbott*, 490 U.S. 401 (1989), and *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) – have the lower courts been directed, as in this case, to examine a general regulation as applied *to a particular prisoner*. Rather, both of the as-applied cases that Flagner cites involved prisoners' access to magazines, and the as-applied analysis dealt not with individual *prisoners* but with particular *publications*. That is, courts have not said "even if this issue of *Guns & Ammo* raises a security concern among the prison population as whole, is it safe for Prisoner X to receive it because he in particular has never tried to escape or to commit violent acts in the past?" That of course is the kind of approach that the court of appeals adopted in this case with respect to Ohio's short-beard rule.

Rather, both this Court in *Thornburgh* and the court of appeals in *Amatel* examined – and found valid on their face – prison regulations that gave federal officials the authority to keep out selected publications, and then both courts directed lower courts to examine whether particular publications were suitable or unsuitable for the prison population *as a whole*. See *Thornburgh*, 490 U.S. at 404-05 (upholding a regulation that allowed prison wardens to reject publications that were "detrimental to the security, good order, or discipline of the institution," and then remanding the case "for a determination of the validity of the regulations as applied to each of the 46 publications"); *Amatel*, 156 F.3d at 201 (doing the same for a ban on funding for sexually explicit materials in federal prisons, and rejecting a "detailed

prisoner-by-prisoner . . . sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner"), *cert. denied*, 527 U.S. 1035 (1999).

Unlike those bans on selected publications – which permitted prison officials to designate some magazines as appropriate and others not, and therefore called, as this Court said in *Thornburgh*, for an as-applied weighing of each publication – Ohio's rule for beards imposes an across-the-board ban on facial hair longer than one-half inch. There is no as-applied component to a short-beard rule as there is and must be in any rule limiting the wide variety of incoming magazines at a prison. Yet, despite the seeming legitimacy of the Ohio rule's limit on beards for all inmates, the court of appeals held that Ohio may not enforce the rule against Flagner unless the State also shows that he in particular poses a special danger by wearing a long beard. That extra burden of proof on the government is one that no federal court has ever imposed under *Turner*, and it is one that is squarely at odds with the deference that *Turner* and other cases have given prison officials in "the volatile prison environment." *Thornburgh*, 490 U.S. at 413.

Flagner claims that the Ohio beard-length rule is an "exaggerated" response to the legitimate security concerns voiced by the State's prison officials about long beards. But nothing in his brief in opposition, or in the Sixth Circuit's opinion, suggests that the response is an exaggerated one for the prison population as a whole. That ought to end the matter, for this Court has already said that a response is not "exaggerated" if prison officials "have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm." *Thornburgh*, 490 U.S. at 419. That is just what Ohio officials have done by setting beard lengths at one-half inch and no more, and that rule is an

appropriate one for the prison environment, given the concerns about "[q]uick identification [of escapees], removal of a place to hide small contraband, [and] prevention of sanitation problems" that the court of appeals itself described as "legitimate penological concerns" in an earlier opinion. Pet. App. 13a-14a (quoting *Pollack v. Marshall*, 845 F.2d 656, 659 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988)). As we noted in the petition at 10, every other circuit that has considered prison hair-length regulations has agreed.

Despite the apparent reasonableness of the beard-length rule generally, however, Ohio now cannot enforce the rule unless state officials show that anyone who objects to the rule – like Flagner – poses a special security risk by wearing a long beard. Ohio cannot, in other words, proactively anticipate security problems, but must instead wait until each prisoner hides weapons or tries to escape before we may demand compliance with rules that advance our reasonable penological objectives. That burden on the government to justify in federal court the enforcement of each prison rule on an inmate-by-inmate basis poses dangers to prison staff and other inmates alike, and it turns on its head the notion that "prison administrators . . . and not the courts [are] to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89 (citation omitted).

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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October 2001